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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL LEE FINERTY, et al.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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August 1997

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QUESTIONS PRESENTED

The Communications Workers of America ("CWA") is an international labor union, primarily representing private sector telecommunications employees in the United States covered by the National Labor Relations Act ("NLRA"). In addition, CWA also represents employees in foreign countries, employees of state and local governments, and employees in the United States who work in widely diverse industries having nothing to do with telecommunications (*e.g.*, the nursing home and health care industries).

The questions presented are:

1) May CWA require objecting nonmembers covered by the National Labor Relations Act to pay, as a condition of continued employment, for union expenses incurred for bargaining units in wholly unrelated industries, and for bargaining units covered by public sector labor laws and foreign labor laws?

2) Consistent with this Court's decision in *CWA v. Beck*, 487 U.S. 735 (1988), may CWA provide objecting nonmembers with financial information that discloses and allocates expenses only on an "agglomerated" international basis, with no specific information provided about the major categories of expenses incurred outside the nonmembers' bargaining unit, including units in unrelated industries and units covered by public sector labor laws and foreign labor laws?

PARTIES TO THE PROCEEDINGS BELOW

In addition to Michael Lee Finerty, the other Petitioners in this Court are Eileen Accetta, George H. Aurig, Jr., Janet L. Brown, Robert Browne, James Cabot, James Caparoni, Diane Dilly, Lynne Hettick, Ednoa Hill, Dennis L. Johnson, Joseph F. Kelly, Friderich J. Kollman, Robert Krom, Timothy Lawrence, Jack Lucken, Carolyn A. Mayer, Richard McLaughlin, Rich Mechling, Edward Palla, William E. Peck, James A. Pogras, Ida Scott, Jesse Utt, Janice Vilensky, Lanny Vilensky, and Richard W. Zawatzke. These individual employees were Charging Parties before the National Labor Relations Board and filed the Petition for Review in the United States Court of Appeals for the District of Columbia Circuit.

The National Labor Relations Board ("NLRB") is the Respondent in this Court, and was a Respondent in the court of appeals.

The Communications Workers of America ("CWA") was a Charged Party and Respondent in the proceedings before the NLRB, and was an intervenor in the United States Court of Appeals for the District of Columbia Circuit.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Michael Lee Finerty, *et al.*, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered on June 3, 1997.

OPINIONS BELOW

The court of appeals' decision appears in Appendix ("App.") A, 1a, *infra*. It is officially reported at 113 F.3d 1288 (D.C. Cir. 1997). The decisions of the National Labor Relations Board and its administrative law judge (App. B, 10a) are officially reported at 322 N.L.R.B. No. 22 (1996).

JURISDICTION

The opinion and judgment of the court of appeals were entered on June 3, 1997. This Petition is filed within 90 days of that date.

This Court has jurisdiction to review the decision of the court of appeals pursuant to 28 U.S.C. § 1254(1).

The notifications required by U.S. Supreme Court Rule 29.4 (b) are being made simultaneous with the filing of this Petition.

STATUTORY PROVISIONS INVOLVED

The provisions of the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, which are primarily involved in this case are 29 U.S.C. §§ 157, 158(a)(3) and 158(b)(1)(A). In pertinent part, these statutes state:

> § 157. **Right of employees as to organization, collective bargaining, etc.**
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

> § 158. **Unfair labor practices**
>
> **(a) Unfair labor practices for an employer**
>
> It shall be an unfair labor practice for an employer—
>
> **(3)** by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such employment or the effective date of such agreement, whichever is the later.

(b) Unfair labor practices by labor organization
It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title:...

STATEMENT OF THE CASE

Jurisdiction Below: Petitioners Michael Lee Finerty *et al.* ("nonmembers") invoked the jurisdiction of the National Labor Relations Board ("NLRB" or "Board") under § 10 (a)-(c) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § (a)-(c), which authorizes the Board to prevent unfair labor practices. The nonmembers' unfair labor practice charges challenged the Communications Workers of America's collection and use of compulsory union dues for political, ideological and noncollective bargaining purposes, as well as its use of their dues for activities outside of their bargaining unit and outside of the United States. *See CWA v. Beck*, 487 U.S. 735 (1988). The General Counsel of the NLRB issued a consolidated complaint against the Communications Workers of America ("CWA") and several of its local affiliates, pursuant to § 10(b) of the NLRA, 29 U.S.C. § 160(b).

The Board Decision and Order over which review is sought was issued on September 5, 1996. That Decision and Order was a "final order" disposing of all issues. On September 18, 1996, the nonmembers filed a Petition for Review and invoked the jurisdiction of the court of appeals under § 10(f) of the NLRA, 29 U.S.C. § 160(f) (authorizing the filing of Petitions for Review by persons aggrieved by final decisions of the Board). The court of appeals' decision over which review is now sought was issued on June 3, 1997. This Petition is filed within 90 days of that date.

Statement of the Facts and Proceedings Below: Between 1986 and 1991, Michael Lee Finerty and approximately sixty other individual nonmembers throughout the country filed scores of separate unfair labor practice ("ULP") charges against the union which had been certified as their exclusive bargaining representative, the Communications Workers of America and several of its local affiliates. In general, these ULP charges alleged that the CWA and its affiliates restrained and coerced the nonmembers in the exercise of their right to refrain from support-

ing political and non-representational activities to which they objected. *CWA v. Beck*, 487 U.S. 735 (1988).

On October 18, 1991, the NLRB's General Counsel issued a Complaint under § 10(b) of the NLRA, 29 U.S.C. 160(b), alleging several violations related to the collection and use of "agency fees" from objecting nonmembers. The Complaint consolidated these many separate ULP charges from around the country into a single case.

Formal hearings were held on April 15, 1992, and June 15, 1992, before Administrative Law Judge ("ALJ") Burton Litvack. Several issues raised in the Complaint were settled. In lieu of live witness testimony, the parties entered into a comprehensive stipulation of facts[1] concerning the two issues that remained after the settlements, to wit: 1) whether CWA was permitted to charge objecting nonmembers for expenses incurred outside of their specific bargaining unit, including expenses incurred in unrelated industries, and expenses incurred for bargaining units covered by public sector labor laws and foreign labor laws; and 2) whether CWA was required to provide objecting nonmembers with financial disclosure that was related to the specific bargaining units and industries involved, including units covered by public sector labor law and foreign labor law.

The stipulated facts show the following: Michael Lee Finerty and the other nonmembers are represented for purposes of collective bargaining by CWA, but have all chosen to refrain from joining that organization. Moreover, they have all objected to supporting the political and non-collective bargaining causes of CWA and its affiliates. Michael Lee Finerty is employed in California by Pacific Bell, a major provider of telephone and communications services in California and Nevada.

1) Facts Regarding CWA Representation:

CWA represents employees in the United States, where the NLRA applies, and in Canada, where the NLRA does not apply. It represents employees under the NLRA who must pay at least reduced *Beck* fees under 29 U.S.C. § 158(a)(3), and NLRA-covered employees who are exempt from any union security

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[1] The Stipulation was an "all party" agreement, entered into by the NLRB General Counsel, the CWA and the Petitioners.

requirements under 29 U.S.C. § 164(b). CWA also represents employees of state and local governments, who are specifically exempted from coverage under the NLRA. 29 U.S.C. § 152(2). CWA represents approximately 560,000 employees in total.

- CWA represents 290,000 employees in 45 bargaining units in 7 Regional Bell Operating Companies, which include: 34,000 in 11 units at Ameritech, 40,000 employees in 7 units at Bell Atlantic, 61,000 employees in 5 units at Bell South, 35,000 employees in 13 units at NYNEX, 39,000 employees in 1 unit at Pacific Bell/Nevada Bell, 42,000 employees in 4 units at South West Bell, and 42,000 employees in 4 units at U.S. West.

- CWA represents 45,000 employees in 120 bargaining units at the non-Regional Bell operating companies.

- CWA represents 8,000 employees in 420 bargaining units at cable television companies and "interconnect" companies.

- Approximately 280 Locals assist CWA in representing employees at the non-Regional Bell operating companies, cable television companies and the interconnect companies. Many of these Locals assist CWA in representing employees in other industries and at other employers.

- CWA represents 94,000 employees in 8 bargaining units at AT&T. Approximately 450 Locals assist CWA in representing AT&T employees. Many of these Locals assist CWA in representing employees in other industries and at other employers.

- CWA represents 96,000 employees in 310 public employee and health care bargaining units, including clericals employed by the State of New Jersey, and nursing home and hospital workers. Approximately 140 Locals assist CWA in representing these employees. Many of these Locals assist CWA in representing employees in other industries and at other employers.

- CWA represents 19,000 printing sector employees in the United States, with approximately 1,140 bargaining units, and approximately 320 Locals. In this printing sector, CWA

represents approximately 4,000 employees in Canada, in approximately 200 bargaining units.

2) Facts Regarding Competition:

The NLRA-covered employees that CWA represents for collective bargaining purposes are substantially in the telecommunications industry, and their employers are in competition with each other and with other unionized and nonunion domestic and foreign companies.

- In certain markets, the Regional Bell Operating Companies are in competition with one another, with their former parent, AT&T, and with other unionized and nonunion domestic and foreign operating companies and manufacturers of equipment.

- Typically, this competition occurs with respect to Yellow Pages directory advertising, the manufacture and sale of telephone equipment, and providing customers with regular telephone service or cellular telephone service.

- Pacific Bell, Petitioner Finerty's employer, competes with other Regional Bell Operating Companies and other unionized and nonunion domestic and foreign manufacturers in the sale of telephone equipment.

3) Facts Regarding CWA's Personnel:

- CWA is organized into 8 geographic Districts. CWA employs Representatives, some of whom are assigned to particular Locals and some of whom are not.

- Those Representatives who are assigned to particular Locals assist the Region's Area Director in CWA's bargaining and nonbargaining activities.

- Those Representatives who are not so assigned assist the Locals in carrying out the full range of CWA activities, both bargaining and nonbargaining related.

4) Facts Regarding the Calculation of Nonmembers' Reduced Agency Fees:

CWA's calculation of objecting nonmember's reduced agency fees under *Beck* is not limited to collective bargaining related costs incurred within the nonmember's bargaining unit, or

by employer, or by industry. Instead, CWA aggregates all of its costs across all bargaining units, employers, and industries, including its public sector units and Canadian units. The nonmember's agency fee is based on all CWA expenditures without regard to the bargaining unit directly involved, even those covering employees in Canada and employees of state and local governments. Thus, CWA's reduced agency fee does not vary according to the nonmember's bargaining unit, industry, or employer.

5) Facts Regarding Union Security Clauses:

CWA's "union security" clauses with various employers are not uniform, either in their language or their application. Typically, these agreements require that nonmembers pay amounts equivalent to a voluntary member's dues. However, in Right to Work states such as Nevada, employees are not obligated to make any payment to CWA. In New Jersey, public sector employees may not be forced to pay more than 85% of a voluntary member's dues.

6) Facts Regarding CWA's Internal Use of the Unit-by-Unit Standard:

Before a strike can be called in any CWA bargaining unit, the members working in that specific unit must vote in favor of the strike. CWA's collective bargaining agreements are subject to ratification by the union members working only in that respective bargaining unit.

Thus, for purposes of collective bargaining and contract ratification (the very functions for which an exaction can be made under *Beck*), CWA's internal procedures utilize the "unit-by-unit" concept, giving input only to employees in the affected units. The collective bargaining process created by CWA in its Constitution concerns "[c]ollective bargaining within the established bargaining unit or units"; topics of negotiation being "initiated by representatives of the bargaining unit or units to be affected"; the process limited to "agendas and programs affecting bargaining units"; and the resulting collective bargaining agreements subject to a secret ballot ratification vote confined to "the members affected."

It is upon these stipulated facts that the administrative law judge and the Board reached their decisions. On May 11, 1993, ALJ Burton Litvack issued a decision upholding the Complaint

in part and dismissing it in part. The ALJ held that while CWA was not bound to apply a strict "unit-by-unit" test to its agency fee calculations and financial disclosure, it could only charge nonmembers for its activities in bargaining units within the same industries in which they worked. The ALJ also held that CWA's financial disclosure to nonmembers had to be allocated on that same "industry-by-industry" basis. (App. B, 43a-44a).

> The stipulated evidence herein is that CWA represents thousands of employees in many different industries. Thus, while one justifiably may argue, in regard to the ALPA [Air Line Pilots Association], which represents employees in just one industry, that whatever affects bargaining unit employees at one company would have the identical effect upon bargaining unit employees at another company, the identical argument carries little, if any, sway with regard to CWA, which represents employees in many different industries. Put another way, it is difficult to believe that Pacific Bell/Nevada Bell contract negotiations, involving telecommunications employees, would have any affect upon, or would be affected by, negotiations involving the Chicago Tribune Company typographical workers bargaining unit or a bargaining unit in the health care industry. Absent the relationship existing between bargaining units in the same industry, as in the ALPA situation, there can be no finding that representation costs, affecting one bargaining unit, will ultimately enure to the benefit of members of another bargaining unit so as to permit CWA to allocate costs on a national, multiple industry basis without violating its duty of fair representation to objecting nonmembers.

(App. B, 43a-44a). Both the nonmember employees and CWA filed exceptions from the ALJ's decision.

More than three years later, the NLRB issued a Decision and Order reversing the ALJ in large part. *CWA Local 9403 (Pacific Bell)*, 322 N.L.R.B. No. 22 (1996); App. B, 10a. Contrary to the ALJ, the NLRB held that CWA could lawfully charge objecting nonmembers for *all* extra-unit collective bargaining

expenditures, including those incurred in bargaining units in unrelated industries and in bargaining units covered by public sector and Canadian labor laws. The NLRB further held that CWA was permitted to "agglomerate" its chargeable versus nonchargeable financial disclosure on a nationwide basis, and need not break the information down according to the expenditures made in specific bargaining units, or unrelated industries, or even those covered by public sector and Canadian labor law. (App. B, 15a). The nonmembers filed a Petition for Review.

On June, 3, 1997, the court of appeals upheld the Board's decision and denied the nonmembers' petition for review. 113 F.3d 1288 (D.C. Cir. 1997); App. A, 1a. According to the panel, CWA's allocation of chargeable versus nonchargeable expenses across the entire union structure, made without regard to the industry, bargaining unit, or nation in which the expenditures are made, is a "logical outgrowth" of this Court's decision in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). App. A, 2a. This Petition follows.

REASONS FOR GRANTING THE WRIT

CONGRESS DID NOT INTEND TO FORCE OBJECTING NONMEMBERS COVERED BY THE NLRA TO SUBSIDIZE UNION ACTIVITIES IN UNRELATED BARGAINING UNITS AND INDUSTRIES, AND BARGAINING UNITS COVERED BY PUBLIC SECTOR LABOR LAWS AND CANADIAN LABOR LAWS.

A. INTRODUCTION.

This case raises a fundamental question about the scope and extra-territorial reach (if any) of the National Labor Relations Act. The issue is whether Congress intended to require objecting nonmembers in a bargaining unit covered by the NLRA to contribute to union expenditures made on behalf of employees in foreign nations, employees of state and local governments, and employees working in completely unrelated industries. The Board and the appeals court held that Congress intended to allow

international labor unions, like CWA, to force objecting nonmembers to pay for such activities, relying upon *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), as the basis for upholding such "union-wide agglomeration." (App. B, 15a). According to the appeals court, CWA's allocation of chargeable versus nonchargeable expenses across the entire union structure, made without regard to the industry, bargaining unit, or foreign nation in which the expenditures are made, is a "logical outgrowth" of *Lehnert*. (App. A, 2a).

The nonmembers disagree, for nothing in the NLRA indicates that Congress intended the statute to be applied so broadly as to force American workers to fund collectivism in foreign nations and among public sector employees. As such, CWA's "union-wide agglomeration" cannot be a "logical outgrowth" of *Lehnert v. Ferris Faculty Association*. To the contrary, both the Board and the court of appeals failed to recognize that the NLRA has no extra-territorial effect, and that Congress never intended to allow American workers to be fired for refusing to support unionization in foreign countries and public sector bargaining units.

Indeed, the Board overstepped its statutory bounds in this case, failing to remember that it was established to oversee the National Labor Relations Act, and private sector labor relations under that particular statutory scheme. The Board does not oversee labor relations under state public sector labor laws and Canadian labor laws. Yet that is the thrust of the Board's decision — that Michael Finerty, who works for Pacific Bell in California under the NLRA, must support labor relations activities governed by public sector labor acts and other countries' labor laws, or face discharge. While the Board may be charged with ensuring "labor peace" under the NLRA, this mandate does not extend to ensuring "labor peace" in foreign nations, under other statutory schemes, with Michael Finerty's compelled agency fees. Moreover, while the Board may also be charged with eliminating so-called "free riders" under the NLRA (in the 29 states that have failed to forbid compulsory unionism under 29 U.S.C. § 164(b)), Michael Finerty is not a "free rider" when he is willing to fund the negotiation and administration of

his own contract, but declines to voluntarily fund the negotiation of contracts for foreign workers, public employees in New Jersey, health care workers who reside a continent away from him, or even NLRA-covered employees in unrelated bargaining units and industries.

This case is of great practical importance, as the NLRA is the nation's basic labor law, covering virtually the entire private sector work force. While § 14(b) of the Act, 29 U.S.C. § 164(b), permits states to proscribe "union security" and other compulsory unionism arrangements, 29 states covering two-thirds of the United States population have not elected to do so. In the states that permit "union security" arrangements, 90% of NLRA-covered collective bargaining agreements, covering millions of workers, contain such "union security" clauses.

Moreover, the issues raised by this case are becoming more important each day, as increasing numbers of employees learn of, and exercise, their right to refrain from supporting the political and non-bargaining agenda of international labor unions. *See CWA v. Beck*, 487 U.S. 735 (1988); *AFL-CIO Endorses Clinton, Approves $35 Million Political Program*, Washington Post, March 26, 1996; *What Union Members Think*, Washington Times, May 1, 1996 (poll by Luntz Research reveals that 62% of union members oppose the use of their funds for the AFL-CIO's political campaigns); *see also California Saw & Knife Works*, 320 N.L.R.B. 224 (1995); *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415 (D.C. Cir. 1997).

If the Board's decision allowing the chargeability of world-wide extra-unit "bargaining" activity is not reversed, then the NLRA contains few realistic limits on what an objecting non-member may be charged. Under those circumstances, CWA (and every other international union) will be free to charge NLRA-covered employees in the United States for activities in "branch offices" in Mexico, Israel, Estonia, Indonesia and any other country they choose! But Congress did not enact the NLRA to "unite the workers of the world," or even to unite American public sector employees with their private sector counterparts. (*See* 29 U.S.C. § 152(2) and (3) (excluding political subdivisions

and their employees from the reach of the NLRA); *Ellis v. BRAC*, 466 U.S. 435, 451 (1984) (holding "organizing" efforts aimed at other bargaining units nonchargeable.)) The Board is wrong to hold otherwise, and this Court should exercise its supervisory power to correct this grievous error affecting millions of employees.

B. THE RIGHTS AND DUTIES CREATED BY THE NLRA ARE BASED UPON THE EXISTENCE OF DISCRETE AND CLEARLY DEFINED BARGAINING UNITS. NEITHER INTERNATIONAL LABOR UNIONS NOR THE BOARD IS FREE TO IGNORE THESE "BARGAINING UNIT" LIMITATIONS AT WILL.

The Board and the appeals court disregarded the structure and policy of the NLRA, which mandates that objecting nonmembers be charged only for the activities that relate to their bargaining unit. Indeed, this "bargaining unit standard of chargeability" is enshrined in the plain language of the NLRA itself, is part and parcel of the Board's effectuation of the Act through all types of election and unfair labor practice procedures, and is uniformly applied in Board decisions and court cases. By abandoning the bargaining unit concept solely in cases where individual employees object to funding nonrepresentational activities (under *CWA v. Beck*), the Board and the appeals court have flatly ignored the plain language of the Act, and taken a position at odds with longstanding Board and court decisions concerning the importance of identified and discrete bargaining units.

The Act itself is the departure point for the correct analysis of the "bargaining unit standard of chargeability":

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes*, shall be the exclusive representatives of all the employees *in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

NLRA, § 9(a), 29 U.S.C. § 159(a) (emphasis added).

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the *unit appropriate for the purposes of collective bargaining* shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .

NLRA, § 9(b), 29 U.S.C. § 159(b) (emphasis added).

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of *the employer* and the representative of *the employees* to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . .

NLRA, § 8(d), 29 U.S.C. § 158(d) (emphasis added).

Indeed, 29 U.S.C. § 158(d) does not define "collective bargaining" as the obligation of *any* and *every* union to bargain with *any* and *every* employer (including those operating under public sector or Canadian labor laws). Only when a union has certification rights for a specific and defined unit of employees can it demand that an employer bargain.

For example, in *Paperworkers Local 620 (International Paper Co.)*, 309 N.L.R.B. 44 (1992), the NLRB struck down a "pooled" voting system which allowed the employees in one bargaining unit to veto the contract ratification decisions made by employees in a different unit.

> The pool runs afoul of the Act ... because its structure and operation permit wholly separate bargaining units, each voting on its own separate contract, to effectively veto another bargaining unit's contract on the basis of extraneous considerations having no direct bearing on the substantive terms of the other unit's contract.

Id. at 45; *Torrington Co.*, 305 N.L.R.B. 938 (1991) (company not obliged to bargain over the elimination of health care benefits for non-unit employees); *Iron Workers Local No. 433*, 266 N.L.R.B. 154, 157 (1983) (unions cannot lawfully require an employee to satisfy a dues arrearage incurred in one bargaining unit as a condition of employment in a different unit). The NLRB should have applied these same considerations — but did not — when it permitted CWA to force Michael Finerty, as a condition of his employment with Pacific Bell in California, to support far-flung union activities occurring in other bargaining units, many covered by other labor statutes.

In addition to the face of the Act itself, this Court's cases confirm that the "bargaining unit" concept is at the heart of the structure of the NLRA. In *Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971), the Court held that retirees' health benefits were not a mandatory subject of bargaining because those retirees were outside of the relevant bargaining unit:

> Together, these provisions establish the obligation of the employer to bargain collectively, "with respect to wages, hours, and other terms and conditions of employment," with "the representatives of his employees" designated or selected by a majority "in a unit appropriate for such purposes." This obligation extends only to the "terms and conditions of employment" of the employer's "employees" in the "unit appropriate for such purposes" that the union represents.

Id. at 164.

This Court's words in *NLRB v. Action Automotive, Inc.*, 469 U.S. 490 (1985), are even clearer about the relationship between precisely defined bargaining units and the proper administration of the NLRA:

> Section 9 (b) of the Act vests in the Board authority to determine "the unit appropriate for purposes of collective bargaining...." The Board does not exercise this

> authority aimlessly; in defining bargaining units, its focus is on whether the employees share a "community of interest...." A cohesive unit - one relatively free of conflicts of interest - serves the Act's purpose of effective collective bargaining, and prevents a minority interest group from being submerged in an overly large unit.

Id. at 494 (citations omitted).

In fact, this Court has cautioned the Board against stretching the plain meaning of the Act to include amorphous classes of workers that Congress did not intend to cover.

> [T]he labor disputes that [Congress] ordered to be subjected to collective bargaining were those of employers and their active employees. Nowhere in the history of the NLRA is there any evidence that retired workers are to be considered as within the ambit of the collective-bargaining obligations of the statute.

Pittsburgh Plate Glass, 404 U.S. at 166.

Nowhere in the history of the NLRA is there any evidence that an amorphous class of foreign and public sector workers — whose only connection to Michael Finerty and the other nonmembers is the random "fortuity" that their separately certified collective bargaining representative turned out to be the same international labor union — are to be given the benefit of the dues extracted from Michael Finerty and the other nonmembers solely because of the coercive power granted by § 8(a)(3) of the NLRA. "[T]he Board's powers in respect of unit determinations are not without limits, and if its decision oversteps the law it must be reversed." *Pittsburgh Plate Glass*, 404 U.S. at 171 (citations omitted).

The collective activities of public sector employees, Canadian employees, hospital workers and even the NLRA-covered employees of competing telephone companies do not affect the "terms and conditions of employment" of NLRA-covered

employees like Michael Finerty. As ALJ Litvack properly recognized, these widely disparate employees do not share any legally cognizable mutual interest with regard to their wages, hours and other conditions of employment. (App. B, 42a-44a; *see also Pittsburgh Plate Glass*, 404 U.S. at 172-73.)

The Board may believe that CWA's cross-bargaining unit "agglomeration" is desirable, commonplace and "standard operating procedure" for many large unions, notwithstanding the different industries and labor statutes involved. But even "established industrial practices," or the Board's apparent view that unions operating under Canadian and state labor laws need to be strengthened (at the expense of NLRA-covered employees), cannot alter the structure and scope of the Act itself, or undermine the nonmembers' § 7 right to refrain from collective activities. 29 U.S.C. § 157; *Pittsburgh Plate Glass*, 404 U.S. at 175-77.

In *Pittsburgh Plate Glass*, 404 U.S. at 180-81, this Court found "too speculative" the Board's rationale that active employees "need" to support retirees' standard of living in order to support their own. The same analysis should be applied to the Board's latest notion — that NLRA-covered employees like Michael Finerty "need" to support the collective efforts of public employees, foreign workers, hospital workers, newspaper printers and employees of competing telephone companies in order to support their own.

Likewise, in *Ellis v. BRAC*, 466 U.S. 435, 451 (1984), this Court held union organizing efforts aimed at other bargaining units to be nonchargeable, because "the notion that § 2, Eleventh would be a tool for the expansion of overall union power appears nowhere in the legislative history." This notion — the need to strengthen union power in bargaining units other than the nonmembers', often for workers covered by other foreign and public sector labor statutes — appears nowhere in the text or legislative history of the NLRA either. The Board's perception that Michael Finerty should be forced to support extra-unit expenditures in all sorts of extraneous bargaining units because they "strengthen" his

bargaining unit is wrong, and legally irrelevant in any event. *Ellis*, 466 U.S. at 451.

In a similar vein, this Court has recognized the tension inherent in a union's representation of employees of competing employers, and stated federal labor policy this way:

> [T]here is nothing in the labor policy [of the United States] indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours, and working conditions of other bargaining units or to attempt to settle those matters for the entire industry. On the contrary, *the duty to bargain unit by unit* leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant without being straight-jacketed by some prior agreement with the favored employers.

United Mine Workers v. Pennington, 381 U.S. 657, 666-68 (1965) (emphasis added).

In short, to be a proper subject of bargaining under the NLRA — and thus a proper subject upon which nonmembers can be lawfully discharged if they fail to support that activity — the activity must relate to the specifically defined bargaining unit.

This Court has recognized the "bargaining unit" relationship in other contexts as well, such as in determining the scope of the duty of fair representation.

> Under the duty of fair representation the exclusive agent's statutory authority to represent *all members of a designated unit* includes a statutory obligation to serve the interests of all [unit] members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

Vaca v. Sipes, 386 U.S. 171, 177 (1967) (emphasis added).

> Their [bargaining representatives'] statutory obligation to represent all members *of an appropriate unit* requires them to make an honest effort to serve the interests of all of those members, without hostility to any.

Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953) (emphasis added).

These cases support the rule that chargeability, like the duty to bargain and fairly represent all employees, must be limited to the specific bargaining units involved. The NLRB and the appeals court erred in ignoring this clearly defined law.

C. THE NLRA HAS NO EXTRA-TERRITORIAL EFFECT AND CANNOT BE CONSTRUED TO REQUIRE AMERICAN WORKERS TO SUPPORT THE BARGAINING OF WORKERS IN FOREIGN COUNTRIES COVERED BY FOREIGN LABOR LAWS.

Both the Board and the appeals court glossed over the fact that CWA is charging objecting American workers for its activities in support of foreign bargaining units covered by foreign labor laws. In doing so, they failed to recognize the well-settled law that the NLRA has no extraterritorial effect, because the rights and duties created by the statute are limited solely to domestic employers and employees.

For example, this Court has held that the NLRA does not regulate the practices of foreign vessels which are temporarily present in an American port with regard to foreign employees working on those vessels. *McCullough v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963). Further, the NLRA does not cover picketing by an American labor union at an American port where such picketing is aimed at altering the employment relationship between owners of foreign vessels and foreign seamen. *American Radio Ass'n v. Mobile S.S. Ass'n, Inc.*, 419 U.S. 215 (1974); *Windward Shipping (London), Ltd. v. American*

Radio Ass'n, 415 U.S. 104 (1974); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142-46 (1957).

Indeed, while the D.C. Circuit has recognized these principles in several NLRA cases, *e.g.*, *International Longshoremen's Ass'n v. NLRB*, 56 F.3d 205, 210 (D.C. Cir. 1995), it ignored them when it upheld CWA's practice of forcing objecting American workers to support collective bargaining in foreign bargaining units covered by foreign labor law. *See also Dowd v. International Longshoremen's Ass'n*, 781 F. Supp. 1565 (M.D. Fla. 1991), aff'd, 975 F.2d 779 (11th Cir. 1992).

CONCLUSION

The Petition should be granted and the case scheduled for full briefing and argument.

Respectfully submitted,

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August 1997

APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

June 3, 1997

[113 F.3d 1288]
Michael Lee FINERTY, et al., Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

Communications Workers of America, Intervenor.

No. 96-1348.

United States Court of Appeals,
District of Columbia Circuit.

Argued April 22, 1997.

Decided June 3, 1997.

[1289]Before EDWARDS, Chief Judge, WILLIAMS and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Chief Judge EDWARDS.

HARRY T. EDWARDS, Chief Judge:

This case involves the limitations on a union in collecting dues and initiation fees from nonmember bargaining unit employees pursuant to union-security clauses.

The Communications Workers of America ("CWA" or "Union") is an international labor organization representing over 500,000 employees in approximately 2,400 bargaining units in the United States and Canada. CWA bargaining units are concentrated in the telecommunications industry, but the union also represents employees working in the printing/publishing and health care industries and in state and local governments. In many of the collective bargaining agreements that it has negotiated, the CWA has union-security provisions requiring unit employees to pay an agency fee as a condition of

employment. However, unit employees who are not members of the CWA are allowed to object to the payment of dues and fees expended by the Union on "noncollective-bargaining activities." In determining what amount to charge those who object, a single nationwide reduced fee is calculated for all objectors based on the CWA's chargeable versus nonchargeable national expenditures, without regard to the particular bargaining unit in which an objector is employed. Because the CWA's "reduced fee" is not calculated on a unit-by-unit basis, the disclosure report that the Union sends to objectors does not give a unit breakdown on the allocation of Union expenditures to the chargeable versus nonchargeable expense categories. The National Labor Relations Board ("NLRB" or "Board") found that CWA did not violate its duty of fair representation under section 8(b)(1)(A) of the National Labor Relations Act ("NLRA" or "Act") by calculating the reduced agency fee charged to objecting nonmember employees on a union-wide, rather than unit-by-unit, basis, or by failing to provide objectors with unit-by-unit financial disclosure reports.

The Board's findings are reasonable. In *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991), the Supreme Court established that a union may charge objecting nonmember unit employees a pro rata share of the costs of chargeable activities of the national affiliate. *See id.* at 524, 111 S.Ct. at 1961-62. Thus, the Board's finding that the CWA's allocation of chargeable expenses on a union-wide, rather than unit-by-unit, basis is a logical outgrowth of *Lehnert* and suggests no violation of the Union's duty of fair representation. Moreover, judicial precedent supports the Board's finding that use of a "local presumption" in allocating expenses—*i.e.*, an assumption that allocation on a union-wide basis is equivalent to allocation on a unit-by-unit basis—is reasonable. Finally, we agree with the Board that unit-by-unit disclosure is not necessary to ensure that nonmembers are paying only for properly chargeable activities. In short, on the record before us, it is clear that we owe deference to the Board's decision. Accordingly, the petition for review is denied.

I. BACKGROUND

A. *Statutory Background*

Section 8(b)(1)(A) of the NLRA makes it an unfair labor practice for a union [1290]to "restrain or coerce ... employees in the exercise of the rights guaranteed in [Section 7 of the NLRA]." 29 U.S.C. § 158(b)(1)(A) (1994). Section 7 of the NLRA affords employees the right to engage, or refrain from engaging, in activities in support of collective bargaining. 29 U.S.C. § 157 (1994). However, an employer and a union may contract to require as a condition of employment that unit employees maintain "membership" in the union, provided that membership is available to all and that it requires nothing more than "tender[ing] the periodic dues and the initiation fees uniformly required." 29 U.S.C. § 158(a)(3) (1994); *see also NLRB v. General Motors Corp.*, 373 U.S. 734, 742, 83 S.Ct. 1453, 1459, 10 L.Ed.2d 670 (1963).

The Supreme Court has held that the NLRA does not "permit[ ] a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment." *Communications Workers of Am. v. Beck*, 487 U.S. 735, 738, 108 S.Ct. 2641, 2645, 101 L.Ed.2d 634 (1988). When such objections are received from nonmember fee-payers, the union must calculate "what proportion of [union] expenditures went to activities that could be charged to dissenters" and then make an appropriate reduction in the agency fee required of objecting nonmembers. *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks, Freight Handlers, Express & Station Employe[e]s*, 466 U.S. 435, 457 n. 15, 104 S.Ct. 1883, 1897 n. 15, 80 L.Ed.2d 428 (1984).

B. *Factual Background*

CWA is an international union representing approximately 558,000 employees in the United States and 4,000 employees in Canada. Approximately 440,000 of these employees work in some 600 different bargaining units in the telecommunications

industry; approximately 90,000 employees work in some 300 state and local government bargaining units; and approximately 23,000 employees work in some 1,340 printing industry bargaining units. Altogether, CWA represents employees in approximately 2,400 different bargaining units.

CWA, not its local unions, is the certified bargaining representative for all employees in the 2400 bargaining units. CWA is divided into eight geographical Districts, which are administrative units of the International Union and not separate local organizations.

Many CWA bargaining agreements include agency shop clauses, which require covered employees, as a condition of employment, to pay an agency fee to the Union equal to normal membership dues. CWA has established a procedure through which nonmembers covered by such clauses can object to the payment of that portion of the agency fee that the Union uses to support activities that are unrelated to collective bargaining. Nonmember unit employees who object are allowed to pay a reduced fee, which is a prorated amount based on Union activities related to collective bargaining.

The Pacific Bell/Nevada Bell Agreement, at issue here, contains an agency shop clause that requires a fee of 1.3% of the employee's basic wage. When a nonmember unit employee objects, CWA's allocation of expenditures between those chargeable to the objector as related to collective bargaining and those that are not chargeable is based on union-wide CWA expenditures without regard to the particular bargaining unit of the objecting employee. In other words, the fee does not vary according to the objector's bargaining unit, industry, or employer.

From 1988 to 1991, various nonmember unit employees who pay agency fees to CWA filed unfair labor practice charges with the NLRB, alleging that CWA's procedure for handling nonmember objections was legally deficient in several ways. The NLRB General Counsel found merit in certain of these allegations and issued a consolidated complaint against

CWA. The Union and the NLRB General Counsel settled all but two of the allegations.

The unsettled paragraphs of the complaint alleged that the procedure used by CWA to calculate the dues of objecting nonmembers violated the Union's duty of fair representation, in contravention of section 8(b)(1)(A) of the NLRA, in that:

(1) it fails to break down expenses into representational and nonrepresenta[1291]tional categories on a unit-by-unit basis in its disclosure statement to objecting nonmembers; and

(2) it charges objecting non-member employees for representational expenses not attributable to the unit in which they are employed.

Communications Workers of Am. and Finerty, 322 N.L.R.B. No. 22, at 2, *reprinted in* Joint Appendix ("J.A.") 146. The settlement agreements between the NLRB General Counsel and CWA provided that these two issues would be litigated in a test case, the instant action filed by petitioner Michael Finerty, an employee working in CWA's Pacific Bell/Nevada Bell Telephone bargaining unit.

The case was first heard by an administrative law judge ("ALJ"). Addressing the second issue first, the ALJ "[found] no merit to the General Counsel's contention that Respondents breached their duty of fair representation by charging objecting nonmembers for representational expenses not attributable [to] the unit in which said objectors are employed." *Id.* at 11, *reprinted in* J.A. 155. Accordingly, the ALJ recommended that this claim be dismissed. *Id.* at 12, *reprinted in* J.A. 156. Then, turning to the first issue, the ALJ held that, even though CWA "did not act in violation of Section 8(b)(1)(A) of the Act by charging objecting nonmembers for representational expenditures not directly attributable to their own bargaining units," the Union did breach its duty of fair representation in violation of section 8(b)(1)(A) of the Act "by ... allocating chargeable expenses on a national rather than unit-by-unit basis on the

disclosure statements given to said individuals." *Id.* at 13, *reprinted in* J.A. 157.

The charging parties and the respondent unions—but not the NLRB General Counsel—filed exceptions to the ALJ's recommendations with the NLRB. Ruling on these exceptions, the Board "adopt[ed] the judge's dismissal of the chargeability allegation, but reverse[d] as to the allocation issue." *Id.* at 2, *reprinted in* J.A. 146. Accordingly, the Board "ordered that the amended consolidated complaint [be] dismissed in its entirety." *Id.* at 4, *reprinted in* J.A. 148.

II. ANALYSIS

With respect to matters of statutory interpretation, we owe considerable deference to the Board's interpretation. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). The Supreme Court has held that

> where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Under this principle, we have traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute.

NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 123, 108 S.Ct. 413, 421, 98 L.Ed.2d 429 (1987) (internal citation omitted) (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781-82).

Petitioners claim that, by calculating the reduced agency fees charged to objecting nonmember unit employees on a union-wide, rather than unit-by-unit, basis, the Board erred in finding that CWA did not violate its duty of fair representation under section 8(b)(1)(A) of the NLRA. We disagree.

As the NLRA clearly does not speak precisely to this issue, we must defer to the Board's position if it reflects a reasonable construction of the statute. The simple question before the Board was whether the CWA violated section 8(b)(1)(A) by charging objecting nonmember employees an agency fee for representational expenditures not directly attributable to their own bargaining units. In this case, the Board held that CWA, *which is the designated bargaining agent for all of the affected employees in its approximately 2,400 different bargaining units*, did not violate its duty of fair representation by allocating chargeable expenses on a union-wide, rather than unit-by-unit, basis. *See Communications Workers of Am. and Finerty*, 322 N.L.R.B. No. 22, at 2 (1996), *reprinted in* J.A. 146. The Board's interpretation is reasonable.

In *Lehnert*, the Supreme Court established that a union "may charge objecting employ[1292]ees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities *were not performed for the direct benefit* of the objecting employees' bargaining unit," as long as two conditions are met: first, that there is "some indication" that the fee is for services that "may ultimately inure to the benefit of the members of the local union" and, second, that the union does not expend fees collected from objecting nonmembers on "bargaining activities wholly unrelated to the employees in their unit." 500 U.S. at 524, 111 S.Ct. at 1961 (emphasis added).

It is indisputable that, by pooling its resources on a union-wide basis, a union, which is the bargaining representative of *all* its members, provides some benefit to members of the various local unions. As the Court noted in *Lehnert*,

> The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the

> bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year.

Id. at 523, 111 S.Ct. at 1961. The same rationale applies here.

The Board's finding is also supported by the court's judgment in *Price v. International Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 927 F.2d 88 (2d Cir.1991). In that case, the Second Circuit held that a union's use of a "local presumption" in allocating chargeable expenses—i.e., "assum[ing] for accounting purposes that the allocation between chargeable and non-chargeable expenditures for the [overall union] is equivalent to the allocation for each of its ... local unions"—is reasonable. *See id.* at 93. The court noted that "the Supreme Court has repeatedly recognized that there are practical reasons why 'absolute precision' in the calculation of the charge to non-members cannot be 'expected or required.' " *Id.* at 94 (quoting *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n. 18, 106 S.Ct. 1066, 1076 n. 18, 89 L.Ed.2d 232 (1986)). We agree.

We note that, in deciding this case, the Board did not have before it challenges to *specific* representational expenses of CWA. The Board noted that,

> because the amended consolidated complaint failed to identify specific representational expenses, including litigation expenses, as having been unlawfully charged to objectors, that issue is not before us.

Communications Workers of Am. and Finerty, 322 N.L.R.B. No. 22, at 3 n. 4 (1996), *reprinted in* J.A. 147. In other words, the Board assumed that all of CWA's pooled expenses were related to lawful representation activities and, thus, that they fell within the scope of permissible charges under section 8(b)(1)(A) of the NLRA. Because the instant case does not involve challenges to "specific representational expenses," the Board has not decided (1) whether some of the pooled charges may be impermissible (*e.g.*, charges attributable to charitable donations by the Union); or (2) whether some of the pooled

charges may be collected only from employees in certain designated bargaining units (*e.g.*, money for strike funds that would be available to support employees in the private sector, but unavailable to employees in public sector units where strikes are unlawful). As the Board noted, the agency fees charged for specific representational expenses by CWA may be contested in a subsequent challenge proceeding. *See Communications Workers of Am. and Finerty*, 322 N.L.R.B. No. 22, at 4 (1996), *reprinted in* J.A. 148. This decision simply represents an initial finding that CWA's method of allocation is not *per se* unlawful.

Finally, we hold that the Board reasonably concluded that the Union, by providing financial information disclosing the allocation of expenses on a union-wide, rather than unit-by-unit, basis, did not violate its duty of fair representation. This court has held that " '[b]asic considerations of fairness ... dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee.' " *Abrams v. Communications Workers of Am.*, 59 F.3d 1373, 1379 (D.C.Cir.1995) (quoting *Chicago Teach*[1293]*ers Union v. Hudson*, 475 U.S. 292, 306, 106 S.Ct. 1066, 1076, 89 L.Ed.2d 232 (1986)). Petitioners' claim would have some force only if CWA were required to calculate the objecting nonmembers' fees on a unit-by-unit basis. However, for the reasons discussed above, the duty of fair representation includes no such obligation. Thus, unit-by-unit financial disclosure is not necessary to ensure that nonmembers are paying only for properly chargeable activities. On this issue as well, we defer to the Board's interpretation as reasonable.

III. CONCLUSION

For the reasons discussed above, we deny the petition for review.

APPENDIX B

DECISION AND ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

September 5, 1996

and

DECISION AND ORDER OF THE

ADMINISTRATIVE LAW JUDGE

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322 N.L.R.B. No. 22
153 L.R.R.M. (BNA) 1195

Communications Workers of America, AFL–CIO, Local 9403 (Pacific Bell) *and* Michael Lee Finerty. Case 20-CB-7726, et al.

September 5, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

This case[1] presents issues concerning the judge's approval of a series of unilateral settlement agreements and his disposition of remaining complaint allegations that rely on limitations imposed on unions by the Supreme Court's *Beck* decision[2] in collecting dues and initiation fees from nonmember unit employees pursuant to a contractual union-security clause.

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[1] On May 11, 1993, Administrative Law Judge Burton Litvack issued the attached decision and order. The Respondent, Charging Party Chicago Tribune Company, and individual charging parties represented by the National Right to Work Legal Defense Foundation (Foundation) filed exceptions and supporting briefs. The Respondent and the Foundation filed answering briefs and the Foundation filed a reply brief.

In addition, on May 11, 1993, Judge Litvack issued a separate order (attached) dismissing an objection filed by Charging Party James S. Ritter to the calculation by the Regional Director for Region 20 of a dues reimbursement amount owed Ritter pursuant to unilateral settlement agreements between the Respondent and General Counsel. On October 27, 1993, the Board granted Ritter's request to withdraw his request that the Board review the judge's order of May 11, 1993.

[2] *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order. In brief, we affirm the judge's approval of the settlement agreements, but, for the reasons set forth below and in the decision in *California Saw & Knife Works*, 320 NLRB No. 11 (Dec. 20, 1995), we shall dismiss the remaining complaint allegations.

The judge's decision fully describes the facts of this case. Respondent Communications Workers of America (CWA) is an international labor organization which represents approximately 558,000 employees in 2400 bargaining units in the United States and Canada. Although chiefly concentrated in the telecommunications industry, where most employees are employed by the Regional Bell Operating Companies, the remainder of the employees represented by the Respondent work mainly in the printing/publishing industry, the health care industry, or in state and local governments.

Structurally, the Respondent is divided into eight geographic districts and 1100 affiliated locals within the United States. The Respondent, rather than the districts and locals, is the certified Section 9(a) representative for all employees in the 2400 bargaining units. In this capacity, the Respondent oversees all aspects of the collective-bargaining process with industry employers, from establishing industrywide bargaining goals on such matters as compensation, benefits, job security and working conditions to the actual negotiation, administration and enforcement of bargaining agreements. Representatives from the districts and locals provide assistance to the Respondent with respect to many of these duties, especially contract negotiations and grievance-arbitration processing. In addition, the Respondent hires district organizers who are charged with organizing new bargaining units, and it employs a legal department whose attorneys are responsible for labor-relations litigation and other legal matters associated with its role as a labor organization.

The Charging Parties are not members of the Respondent, but they work in bargaining units represented by the Respondent

and subject to union-security provisions in collective-bargaining agreements between their employers and the Respondent. These agreements obligate the nonmembers to pay an agency fee as a condition of employment. For example, the contract covering employees represented by the Respondent who work at Pacific Bell/Nevada Bell contains an agency shop clause requiring all employees who have not formally joined the Respondent to pay an agency fee equivalent to the dues paid by full union members.

The Respondent has established a procedure pursuant to its understanding of *Beck* which allows nonmembers, like the Charging Parties, to object to the payment of dues and fees expended by the Respondent on noncollective-bargaining activities. The mechanics of this procedure require objections to be filed during the month of May for the upcoming "fee year" that runs from July 1 through June 30. Upon receipt of the objection, the Respondent sends the objector an "advance reduction" check equal to the portion of an objector's fee year payment which the Respondent determines constitute "nonchargeable" expenses. Along with the check, the Respondent includes a disclosure report summarizing its major categories of chargeable and nonchargeable expenditures, with an explanation of how the dues reduction fee was calculated.

A single nationwide reduced fee is calculated for all objectors based on the Respondent's chargeable versus nonchargeable national expenditures, without regard to the particular bargaining unit in which an objector is employed. By way of example, the Respondent defines strike benefits as a chargeable expense requiring the financial support of all objectors, i.e., objectors em[2]ployed in the unit on strike as well as objectors employed in other bargaining units in the same industry and in bargaining units in different industries. In short, the reduced fee charged to objectors does not vary according to the objector's bargaining unit, industry, or employer. Accordingly, because the Respondent's chargeable expenses are not calculated on a unit-by-unit basis, the disclosure report that it sends to the objectors does not break down by unit the allocation of union expenditures to the chargeable versus nonchargeable categories.

Pursuant to charges filed in 16 Regional Offices of the Board on various dates from 1988 to 1991, the General Counsel issued an amended consolidated complaint against the Respondent and its affiliated Districts and I ocals alleging a host of violations with respect to their *Beck* procedure for accommodating nonmember employees opposed to paying dues for expenditures unrelated to collective bargaining. Thereafter, in a series of unilateral settlement agreements between the Respondent and General Counsel, all but two of the consolidated complaint allegations of violations were resolved.[3]

The remaining unresolved allegations assert that the Respondent's *Beck* objection procedure is unlawful in that:

> (1) it fails to break down expenses into representational and nonrepresentational categories on a unit-by-unit basis in its disclosure statement to objecting non-members; and
>
> (2) it charges objecting non-member employees for representational expenses not attributable to the unit in which they are employed.

The settlement agreements provided that these two issues would be litigated on a test case basis in Case 20-CB-7726 arising out of the Respondent's Pacific Bell/Nevada Bell Telephone bargaining unit and that any violations found and remedial relief ordered by the judge would be applicable to all charging parties named in the settlement agreements.

Addressing the latter issue first, the judge concluded that unions subject to the jurisdiction of the NLRA may lawfully charge objectors for collective-bargaining expenses not directly attributable to their bargaining unit. Accordingly, he found that the Respondent did not violate its duty of fair representation by charging objectors employed by Pacific Bell/Nevada Bell for representational expenses incurred outside their bargaining unit. The judge, however, found the violation as to the first issue.

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[3] For the reasons set forth by the judge in the attached Order Regarding Proposed Unilateral Settlement Agreements, dated May 13, 1992, we affirm his approval of the settlement agreements.

Thus, notwithstanding the judge's finding that it was lawful not to *charge* for representational expenses on a unit-by-unit basis, the judge concluded that under the circumstances of this case the Respondent was required to *allocate* its representational expenses on a unit-by-unit basis. Accordingly, he found that in failing to do so by not setting forth the breakdown of its chargeable expenses on a unit-by-unit basis in the disclosure statements sent to objectors, the Respondent breached its duty of fair representation. For the reasons that follow, we adopt the judge's dismissal of the chargeability allegation, but reverse as to the allocation issue.

Subsequent to the judge's decision in this case, the Board issued its decision in *California Saw & Knife Works*, 320 NLRB No. 11 (Dec. 20, 1995), resolving numerous issues that arose from the holding in *Beck* prohibiting unions under the NLRA from requiring nonmember employees to support with their dues union activities not "germane to collective bargaining contract administration, and grievance adjustment." 487 U.S. at 745. With respect to the two issues presented in the instant case, the Board held that the union in *California Saw* did not act unlawfully by failing to charge or allocate its representational expenses on a unit-by-unit basis.

With respect to the chargeability issue, the General Counsel in *California Saw* had relied on *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), which defined the representational expenses that objecting nonmembers under the Railway Labor Act could be compelled to support as those reasonably incurred in performing the "duties of the union as exclusive representative of the employees *in the bargaining unit*." (Id. at 448, emphasis added.) From this and other references to the bargaining unit in *Ellis*, the General Counsel in *California Saw* argued that a union's obligations under the NLRA similarly must be defined in terms of the bargaining unit and thus a union may only charge objecting nonmembers for representational expenses expended for that unit.

The Board disagreed. It noted that subsequent to *Ellis*, the Supreme Court held in *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991), a public sector case, that

> a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit. [Id. at 524.]

While cautioning that there must be "some indication" that the expenditure of an objector's fee is for services that "may ultimately inure to the benefit of the members of the local union," (id.), the Supreme Court stated that so long as such expenditures fit the definition of being "germane to collective bargaining [3]and similar support services ... [no] greater relationship is necessary" for the expenses to be chargeable. Id. at 527.

On this authority, the Board in *California Saw* adopted the reasoning of its administrative law judge and concluded that because the Supreme Court allows public sector unions operating under First Amendment constraints to engage in cross-unit agglomeration and averaging to determine a single nationwide chargeable fee applicable to all objectors, the same practice is permissible for unions subject to the Act's duty of fair representation. Accordingly, the Board found that the union therein did not violate its duty of fair representation by charging objectors for representational expenses on other than a unit-by-unit basis.

We find the judge's analysis in dismissing the chargeability allegation in the instant case fully consistent with *Lehnert* and *California Saw*. Indeed, we agree with the judge that there is an even greater justification than in those two cases for the Respondent's practice of charging all objectors a uniform nationwide service fee because, unlike the international unions in those two cases, the Respondent here is the recognized bargaining agent for all employees. In that role, there is a stronger presumption than when a local union is the bargaining representative, that the "parent will bring to bear its often considerable economic,

political, and informational resources" in support of each bargaining unit (*Lehnert*, supra at 523)—the basis upon which the *Lehnert* Court sanctioned the practice of national rather than unit-by-unit charging of representational expenses. Accordingly, we conclude, as the judge did, that the Respondent did not violate its duty of fair representation by charging objecting employees in the Pacific Bell/Nevada Bell bargaining unit for representational expenses incurred outside that unit.[4]

Contrary to the judge, however, we also find that the Respondent did not act unlawfully by failing to allocate its chargeable expenses on a unit-by-unit basis in its disclosure statement sent to objectors. In concluding that such an accounting was required, the judge emphasized the fact that the Respondent represents employees in many different industries and that it was, therefore, "difficult to believe that Pacific Bell/Nevada Bell contract negotiations, involving telecommunications employees, would have any affect [sic] upon, or would be affected by, negotiations involving the Chicago Tribune Company typographical workers bargaining unit or a bargaining unit in the health care industry." The judge distinguished the airline industry cases cited by the General Counsel[5], noting that the courts permitted the pilots union in those cases to allocate chargeable expenses on a national basis because, unlike here, the pilots union represents employees in just one industry and it negotiates contracts directly with the various airlines rather than through locals thereby creating the situation that bargaining at one airline directly affects bargaining unit employees at the other airlines. In the absence of a similar relationship between bargaining units in the same industry, the judge concluded that "there can be no finding that representational costs, affecting one bargaining unit,

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[4] We agree with the judge that because the amended consolidated complaint failed to identify specific representational expenses, including litigation expenses, as having been unlawfully charged to objectors, that issue is not before us.

[5] *Crawford v. Airline Pilots Assn. International*, 870 F.2d 155 (4th Cir.1989); and *Pilots Against Illegal Dues v. Airline Pilots Assn.*, 938 F.2d 1123 (10th Cir.1991).

will ultimately inure to the benefit of members of another bargaining unit so as to permit [the Respondent] to allocate costs on a national, multiple industry basis without violating its duty of fair representation to objecting nonmembers." We disagree.

In *California Saw*, the Board held that unit-by-unit allocation of chargeable costs was not required, notwithstanding that the Machinists union in that case, like the Respondent here, represented employees in multiple diverse industries. 320 NLRB No. 11, slip op. at 14. It based this holding on *Price v. International Union, UAW*, 927 F.2d 88 (2d Cir.1991), another case decided under the NLRA. The international union in that case (the United Auto Workers) utilized an accounting practice nearly identical to the Respondent's, in which it assumed that the international's nationwide allocation of chargeable and nonchargeable expenses was equivalent to the allocation for each of its almost 1200 locals. As in this case and *California Saw*, the objectors in *Price* argued that this evidentiary "local presumption" formula was unlawful because the disclosure statements they received, which incorporated the allocation formula, contained no information regarding the expenditures, if any, that were made on behalf of their bargaining unit. The *Price* court considered this argument in light of the Supreme Court's repeated observation that " 'absolute precision' in the calculation of the charge to non-members is not ... to be 'expected or required.' " *Price*, supra at 94 (citation omitted).[6] It concluded that the local presumption formula was a reasonably accurate method of calculating chargeable fees for all unit objectors and, hence, its use did not violate the duty of fair representation.

For these reasons, we similarly conclude that the Respondent's allocation formula satisfies the duty of fair representation and that the Respondent did not act unlawfully by failing to allocate representational costs on a unit-by-unit basis in the disclosure statements sent [4]to objectors. This is not to say, however, that an objector must accept as chargeable the figure

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[6]*See Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963); *Abood v. Detroit Board of Education*, 431 U.S. 209, 239-240 fn. 40 (1977); *Chicago Teachers Union Local 1 v. Hudson*, 475 U.S. 292, 307 fn. 18 (1986).

produced by the Respondent's application of the formula. As the court in *Price* pointed out (927 F.2d at 94), the figure may be contested in a subsequent challenge proceeding where the Respondent will bear the burden of proving that the local union's expenditures are chargeable to the degree asserted. But absent a challenge proceeding establishing the invalidity of the local presumption formula, we simply hold that as an *initial* matter, the Respondent's allocation formula is not, as the General Counsel has suggested, per se unlawful.[7]

ORDER

The National Labor Relations Board affirms the judge's orders approving the settlement agreements reached between the Respondent and the General Counsel, and orders that the Respondent, Communications Workers of America, AFL–CIO, as well as its affiliated Locals affected by the settlement agreements, its officers, agents, and representatives, shall take the action set forth therein.

IT IS FURTHER ORDERED that the amended consolidated complaint is dismissed in its entirety.

Dated, Washington, D.C. September 5, 1996

William B. Gould IV, Chairman

Margaret A. Browning, Member

[7]We note that the judge suggested in his analysis that cost cannot be a factor in determining whether a union has satisfied its obligations under *Beck*. The Supreme Court has made clear, however, that cost may be a factor in determining whether a union has satisfied its duty of fair representation. "The Supreme Court has underscored that fair representation principles are vindicated by 'afford[ing] individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds.' " *California Saw*, supra, slip op. at 20, quoting *Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979).

Sarah M. Fox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

* * * * *

DECISION

STATEMENT THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charges in Cases 20-CB-7726 and 20-CB-7727 were filed on September 6, 1988, by Michael Lee Finerty, an individual; the unfair labor practice charge in Case 20-CB-8752-1 was filed on March 13, 1989, by Friderich J. Kollmann, an individual; the original and first amended unfair labor practice charges in Case 20-CB-8752-2 were filed respectively on January 16 and March 13, 1990, by James S. Ritter, an individual; the unfair labor practice charge in Case 20-CB-8752-5 was filed on July 31, 1989, by William E. Peck, an individual; the unfair labor practice charge in Case 20-CB-8752-6 was filed on April 30, 1990, by Edward Palla, an individual; the unfair labor practice charge in Case 20-CB-8752-8 was filed on January 3, 1990, by Michael F. Stork, Joseph P. Kelly, and George H. Aurig Jr., individuals; the original and first amended unfair labor practice charges in Case 20-CB-8752-9 were filed respectively on October 9, 1990, and January 29, 1991, by James Cabot and Richard McLaughlin, individuals; the original and first amended unfair labor practice charges in Case 20-CB-8752-10 were filed respectively on May 23, 1989 and August 2, 1991, by James Caparoni, an individual; the unfair labor practice charge in Case 20-CB-8752-11 was filed on February 14, 1991, by Diane Dilly, an individual; the original, first and second amended unfair labor practice charges in Case 20-CB-8752-12 were filed respectively on June 3 and July 8 and 14, 1986, by Dennis L. Johnson, an individual; the original, first, and second amended unfair labor practice charges in Case 20-CB-8752-13 were filed respectively

on June 3 and July 8 and 14, 1986, by Rick A. Mechling, an individual; the original, first, and second amended unfair labor practice charges in Case 20-CB-8752-14 were filed respectively on June 3 and July 8 and 14, 1986, by James A. Pogras, an individual; the unfair labor practice charge in Case 20-CB-752-15 was filed on March 16, 1990, by Robert Browne, an individual; the unfair labor practice charge in Case 20-CB-8752-16 was filed on October 29, 1990, by the Chicago Tribune Company; the unfair labor practice charge in Case 20-CB-8752-17 was filed on April 18, 1991, by Jack Lucken, an individual; the original and first amended unfair labor practice charges in Case 20-CB-752-20 were filed respectively on September 21 and December 27, 1989, by Robert Krom, et. al., individuals; the unfair labor practice charge in Case 20-CB-8752-21 was filed on May 6, 1991 by Lynne Hettick, an individual; the unfair labor practice charge in Case 20-CB-8752-22 was filed on October 25, 1989, by Lenny Vilensky, an individual; the unfair labor practice charge in Case 20-CB-8752-23 was filed on Octo[5]ber 25, 1989, by Janice Vilensky, an individual; the unfair labor practice charge in Case 20-CB-8752-25 was filed on April 2, 1990, by Carolyn A. Meyer, an individual; the unfair labor practice charge in Case 20-CB-8752-26 was filed on May 18, 1990, by Janet L. Brown, an individual; the unfair labor practice charge in Case 20-CB-8752-27 was filed on April 30, 1990, by Eileen Accetta, an individual; the unfair labor practice charge in Case 20-CB-8752-28 was filed on April 13, 1987, by Richard W. Zawatzke, an individual; the unfair labor practice charge in Case 20-CB-8752-29 was filed on June 24, 1988, by Richard W. Zawatzke, an individual; the unfair labor practice charge in Case 20-CB-8752-31 was filed on August 23, 1989, by Ednoa Hill, an individual; the unfair labor practice charge in Case 20-CB-8896 was filed on August 8, 1989, by Timothy L. Lawrence, an individual; the unfair labor practice charge in Case 20-C-8967 was filed on September 20, 1989, by Jessie Utt, an individual; and the unfair labor practice charge in Case 20-CB- 8968 was filed on December 18, 1989, by Ida Scott, an individual. Based upon the aforementioned unfair labor practice charges, the Regional Director of Region 20 of the National Labor Relations Board (the Board), issued an amended consolidated complaint on October 18, 1991, and an amendment to said document on April 13, 1992, alleging that Communica-

tions Workers of America, AFL–CIO (Respondent CWA or CWA), CWA Locals 1101, 1104, 1113, 1114, 1123, 13000, 4322, 4340, 4603, 7640, 9403, 9510, 9573, and 9588 (Respondent CWA Locals, Chicago Typographical Union No. 16, Printing, Publishing, and Media Workers Section of Communications Workers of America, AFL–CIO (Respondent Typographical Union), and CWA St. Louis Mailers Union No. 3 (Respondent Mailers Union), and (Respondents), engaged in acts and conduct violative of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act). Respondents timely filed an answer herein, essentially denying the commission of any of the alleged unfair labor practices. The above-captioned matters came to trial before me, by telephone, on April 15, 1992, and on June 15, 1992, in Washington, D.C.[1] All parties were afforded the opportunity to call witnesses and to examine and cross-examine them,[2] to offer into the record all relevant evidence, to argue their legal positions orally, and to file posthearing briefs. The latter were filed by counsel for the General Counsel, by counsel for the National Right To Work Legal Defense Foundation, Inc., and by counsel for Respondents, and each brief has been carefully considered by me. Accordingly based upon the entire record herein, including the posthearing briefs, I make the following[3]

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[1]By an order, dated May 13, 1992, and on June 15, 1992, I approved unilateral settlement agreements in the above-captioned matters, disposing of all but two of the allegations of the amended consolidated complaint.

[2]In lieu of witnesses, the parties entered into a stipulation of facts, which will be described infra.

[3]Neither jurisdiction nor labor organization is an issue herein. As to the former, Respondents admitted all of the jurisdiction paragraphs of the amended consolidated complaint, including that Pacific Bell, Nevada Bell, AT&T Information Systems, New York Telephone Company, Bell Telephone Company of Pennsylvania, American Telephone and Telegraph Communications, Ohio Bell Telephone Company, the Chicago Tribune Company, The Pulitzer Publishing Company d/b/a The St. Louis Post-Dispatch, GTE California Incorporated, U.S. West Communications, and Wisconsin Bell, Inc., are employers engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. With regard to labor organization, Respondents admitted that each is a labor organization within

FINDINGS OF FACT

I. ISSUE

The issue, as framed by the pleadings, involves the General Counsel's interpretation and application of the decision of the Supreme Court in *Communications Workers v. Beck*, 487 U.S. 735, 108 S.Ct. 2641 (1986), concerning limitations, under the Act, upon a labor organization's right to expend financial core fees, which have been collected from nonmember bargaining unit employees who are represented by said labor organization. In *Beck*, relying upon *Machinists v. Street*, 367 U.S. 740 (1961), in which it held that section 2, Eleventh of the Railway Labor Act (RLA) does not permit a union to expend compelled agency fees on political causes over the objections of nonmembers, and *Ellis v. Railway Clerks*, 466 U.S. 435, 447-448 (1984), in which it held that section 2, eleventh of the RLA only permits nonmembers to be charged for expenditures which are "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative," the Court held that Section 8(a)(3) of the Act is, "in all material respects identical" to the aforementioned provision of the RLA and that, while Section 8(a)(3) permits the collection of dues and fees from nonmember employees pursuant to a valid union security clause, it also "... authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor- management issues.' " *Beck*, supra at 108 S.Ct. at 2648, 2657. Using *Ellis*, supra, as guidance, the General Counsel alleges, in the amended consolidated complaint, that Respondents engaged in conduct violative of Section 8(b)(1)(A) of the Act by failing to break down expenses into representational and nonrepresentational categories on a unit-by-unit basis in its disclosure statement to objecting nonmembers and by charging objecting nonmembers for representational expenses not attributable to the bargaining unit in which the objectors are employed. Contrary to the General Counsel, counsel for Respondents argues that subsequent Supreme Court and Circuit Courts of Appeals

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the meaning of Sec. 2(5) of the Act.

decisions to *Beck* establish that CWA's nationwide breakdown of representational and nonrepresentational expenses is permissible under Ellis, that the Act permits such accounting, and that practical considerations necessitate its current accounting practices.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The parties stipulated that[4] the highest governing body within the CWA is its annual Convention of delegates. The Convention has the authority to amend CWA's constitution; establishes the labor organization's policies; adopts a budget; rules on appeals taken by members from decisions of CWA's officers, the executive board, or its locals; and elects CWA's officers. The executive board is comprised of CWA's presi-[6]dent, the secretary-treasurer, two executive vice presidents and 12 vice presidents,[5] and, as the highest governing body within the labor organization when the Convention is not in session, it meets regularly throughout the year, administering the policies established by the Convention and making necessary decisions on various matters, including collective bargaining and strikes. The CWA president is the chief executive of the labor organization and has general authority to carry out all of its policies and programs. Also, said individual oversees all collective bargaining by the labor organization.

CWA is an international labor organization, representing approximately 558,000 employees in 2400 bargaining units in the

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[4]The recitation of facts is based upon the stipulation, which was entered into by the parties, and the attendant exhibits.

[5]CWA is divided into eight geographical districts, and each elects a vice president who is responsible for enforcing and supervising CWA's policies and programs within his or her district. In addition, a vice president represents workers in each of CWA's four departments—communications and technologies, public workers, printing publishing, and media workers, and telecommunications.

United States and Canada. Within this country, CWA is divided geographically into eight administrative districts, with each having jurisdiction over worksites in specific states and being supervised by a district vice president, who is a member of CWA's executive board. Within each district, CWA charters locals, with the charter of each defined in terms of geographic areas and employers. The geographic area covered by a local is usually closely circumscribed, so that all worksites within a local's jurisdiction are near to the local's office or meeting hall. At present, there are approximately 1100 locals affiliated with CWA. Significantly, the international labor organization, rather than any of its districts or locals, is the recognized collective-bargaining representative, and, in this regard, some locals assist CWA in representing more than one bargaining unit.

Each local elects its own officers, and CWA trains them in carrying out the full range of the labor organization's activities. Each local appoints or, in some circumstances, elects certain CWA members to act as stewards in the worksites within that local's jurisdiction. The stewards act as CWA's first level representatives, and the labor organization conducts training programs for them, covering all aspects of their work, including contract interpretation.

The parties stipulated that the largest number of employees, who are represented by CWA, are employed by the Regional Bell Operating Companies (RBOCs), which were divested from AT &T in 1984. At these companies, CWA represents 290,000 employees in 45 bargaining units including 34,000 employees in 11 bargaining units at Ameritech, 40,000 employees in seven bargaining units at Bell Atlantic, 61,000 employees in five bargaining units at Bell South, 35,000 employees in 13 bargaining units at NYNEX, 39,000 employees in one bargaining unit at Pacific Telesis (Pacific Bell and Nevada Bell), 42,000 employees in four bargaining units at Southwest Bell, and 39,000 employees in four bargaining units at U.S. West. At least 430 locals assist CWA in representing the aforementioned employees.

Besides supervising collective bargaining for the aforementioned employees, CWA's telecommunications vice president has

responsibility for overseeing and coordinating collective bargaining with nonRBOC telecommunication companies, with cable television companies, and with small telecommunications contractors known as "interconnects" at which CWA is the bargaining representative for certain employees. In total, the labor organization represents 45,000 employees in 120 bargaining units at the nonRBOC companies and 8000 employees in 420 bargaining units at the cable television companies and at the interconnects. The above vice president is not on the bargaining committees for the nonRBOC companies. Approximately 280 locals assist CWA in representing the aforementioned 53,000 employees. Many of these 280 locals also assist CWA in representing employees in other industries and at other employers.

The communications and technologies vice president has responsibility for overseeing collective bargaining and contract administration within the AT&T bargaining units at which CWA is the bargaining representative for employees. The labor organization represents 94,000 employees in eight bargaining units at AT&T, and the aforementioned vice president is on the bargaining committee for these units. Approximately 450 locals assist CWA in representing AT&T employees, and many of these locals also assist CWA in representing employees in other industries and at other employers.

The public worker/health care vice president is responsible for assisting with collective bargaining and contract administration with respect to bargaining units in state and local government and in public and private health care institutions. CWA represents 94,000 employees in 310 such bargaining units. The above vice president is not on the bargaining committee for these units. Approximately 140 locals assist CWA in representing these employees, and many of these locals also assist CWA in representing employees in other industries and at other employers.

The CWA printing sector is composed of locals that were affiliated with the International Typographical Union, which merged with CWA in 1987. In the United States, the sector has jurisdiction over approximately 1140 bargaining units, with each

employer constituting one unit, and covering approximately 19,000 employees. Approximately 320 locals, within the United States, assist CWA in representing these employees. Finally, approximately 6000 employees work in 180 miscellaneous bargaining units, with each employer constituting one bargaining unit, represented by CWA. These bargaining units include employees working for electrical cooperatives, telephone cooperatives, nonprofit organizations, and manufacturing facilities outside the telecommunications industry.

CWA District 9 covers California, Nevada, and Hawaii, encompasses at least 61 locals, and is geographically divided into two areas. The North, which is served by offices in Burlingame and Sacramento, California, is geographically larger, covering Northern California, Hawaii, and Nevada; while the South, with an office in Los Angeles, California, covers a larger number of represented employees. The District 9 vice president is responsible for the bargaining and nonbargaining operations of the district, and assistants help in carrying out said responsibilities. Both the North and the South areas have area directors, who supervise CWA representatives and who determine whether to take grievances to arbitration. The CWA representatives assist the area director in processing grievances and other bargaining and nonbargaining activities. In this regard, the representatives assist locals, to which they are assigned, in collective- bargaining activities and are responsible for presenting CWA's position on grievances in [7]mediation or at arbitration. In addition to representatives, CWA employs district organizers, who are assigned the specific responsibility of organizing new bargaining units, with the assistance of the representatives. Finally, District 9 employs attorneys, who are responsible for legal matters, such as litigation, bargaining, and grievances involving complicated legal matters or contract interpretation.

With regard to collective bargaining at Pacific Bell and Nevada Bell, which is typical of any bargaining for CWA represented units, the parties stipulated that each company is a wholly owned subsidiary of Pacific Telesis, a publicly held corporation which was incorporated in anticipation of the AT&T divestiture. Subsequent to the divestiture, Pacific Bell and

Nevada Bell basically provided the same services as previously provided by Pacific Telephone and Telegraph and Nevada Bell Telephone and continued to employ the same people, who continued to be represented by CWA. Approximately 8 months before the commencement of RBOC contract negotiations, CWA holds a telecommunications industry bargaining conference, attended by CWA officers, the presidents of those locals with jurisdiction over worksites in the industry, and their staff members. At said meeting, CWA staff presentations are made on economic and bargaining trends and those present adopt industrywide bargaining goals on such matters as compensation, benefits, job security, and working conditions. Subsequently, the Pacific Bell/Nevada Bell bargaining council, which has a chairperson appointed by the District 9 vice president and is comprised of representatives from each local with members within the Pacific Bell/Nevada Bell bargaining unit, meets to formulate CWA's positions for the upcoming negotiations. The council will consider the goals established by the industrywide conference and the results of a survey of the membership in formulating a position.[6] Formal contract negotiations are conducted by a five or six person bargaining committee composed of one or two individuals, who are appointed by the District 9 vice president, and four employees. During the bargaining, the CWA research department assists the bargaining committee in drafting proposals and counterproposals and in formulating information requests. With regard to a possible strike, Pacific Bell/Nevada Bell bargaining unit members must vote in favor of such action, and the CWA executive board then must indicate its approval. In the event of a strike, CWA provides financial assistance to the strikers. Finally, with regard to strikes, the executive board has the authority to terminate a strike.

As to enforcement of the most recent collective-bargaining agreement between CWA and Pacific Bell/Nevada Bell, which is typical of the contract enforcement process at CWA represented

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[6]The stipulation of facts is silent as to whether CWA's contract demands are the same in bargaining with each of the RBOCs or as to whether a new collective-bargaining agreement with one forms the basis for bargaining with the others. The same, of course, is true for other industries.

units, the contract provides a three- step procedure for disciplinary grievances and a two-step procedure for contract interpretation grievances. Grievances are usually filed by stewards and presented to the supervisor, who is responsible for the challenged action. At each succeeding step of the procedure, new representatives usually become involved for CWA and for the company, and, at the final step, CWA is represented by the local's president or his designee. If the grievance remains unresolved, it is sent to District 9 which determines whether to request arbitration. In this regard, a CWA representative makes a recommendation to the northern or southern area director, who decides whether or not to seek arbitration[7] If arbitration is requested, the matter is assigned to a CWA representative. This individual will attempt to settle the grievance by meeting with Pacific Bell/Nevada Bell officials. If settlement is not feasible and, in the case of disciplinary grievances, if mediation is unsuccessful, CWA pays the costs of presenting the grievance in arbitration and shares the cost of the arbitrator with management. Occasionally, when the employer refuses to comply with an award or a dissatisfied grievant claims that CWA breached its duty of fair representation, litigation may result. In this event, the CWA general counsel assigns an attorney to represent the labor organization, and CWA pays the cost of litigation.

The crux of the instant matter is the calculation of the reduced agency fee under CWA's objection procedure. As to this, the parties stipulated that the Pacific Bell/Nevada Bell collective-bargaining agreement contains an agency shop provision which requires employees, who have not joined the labor organization and thus would not have to pay union dues, to pay an agency fee (1.3 percent of the employee's basic wage) equal to normal union dues. Just under half of a nonmember employee's agency fee payment goes to CWA, and just under half goes to the local with jurisdiction over the fee payer's worksite. Most nonmember employees execute dues check-off authorizations and have their agency fees paid by deductions

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[7]If the area director decides against seeking arbitration, his decision may be appealed to the District 9 vice president and, if the decision is affirmed, it may be appealed to the CWA Convention.

from their paychecks. Agency fees deducted in this manner are forwarded by Pacific Bell/Nevada Bell directly to CWA's headquarters. CWA thereupon retains its portion of a nonmember employee's fee and remits the local's portion of the fee to the local with jurisdiction over the employee's worksite. For those nonmember employees who pay their fees directly to their local, the latter retains its portion and remits the CWA's portion to CWA.

CWA's procedure for handling *Beck* objections, filed by nonmember agency fee payers, works on an annual basis. Typically, a nonmember will file an objection during the May window period, and his agency fee will be reduced for the following July-June fee year. However, rather than adjust the amount of fees deducted form the objector's pay or the amount collected by the objector's local, CWA sends the objector an advanced reduction check, which represents CWA's determination of what portion of the objector's fee payments would go for nonchargeable activities if the objector pays the normal fee for the entire July through June fee year.[8] At issue herein is the fact that CWA's allocation of expenses between those that are chargeable to objectors and those that are not chargeable is based on all CWA expenditures without regard to the bargaining unit directly involved. For example, benefits paid to CWA-represented employees on strike in support of CWA contract demands would be counted as [8]chargeable both for objectors employed in the unit on strike and for objectors employed in other bargaining units in the same industry and in bargaining units in different industries. Similarly, the costs of a lawsuit to enforce an arbitration award would be counted as chargeable for objectors employed in the bargaining unit in which the arbitrated grievance was filed as well as for objectors employed in other bargaining units and in other industries. In sum, the fee reduction percentage does not vary according to the objector's bargaining unit,

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[8]Thus, if CWA has calculated that 15 percent of its expenditures are not chargeable to objectors and the objector's normal yearly agency fee would be $300, CWA would send that person a check for $45 at the start of the July through June fee year.

industry, or employer.[9] Finally, under the definition of chargeable expenditures presently applied by CWA, litigation costs are treated as chargeable only if the litigation is directly related to collective-bargaining agreements or CWA's bargaining rights, defending the labor organization against charges of unfair representation, or associational maintenance. As with all other chargeable expense allocations, CWA does not break down its litigation costs on a bargaining unit basis. Under CWA's definition, all other litigation is treated as nonchargeable.

B. *Analysis*

As stated above, the remaining issues in the above-captioned cases concern Respondent's practices of allocating expenses, between those that are not chargeable to nonmember employees and those that not chargeable, based upon all CWA expenditures without regard to the bargaining unit directly involved and of charging objecting nonmembers for representational expenses not directly attributable to the bargaining unit in which the objectors are employed. In his posthearing brief, counsel for the General Counsel notes that, given CWA's allocation procedure, its disclosure statements to objectors contain no information regarding expenditures directly related to an objector's own bargaining unit, and, instead, breaks down expenditures into those incurred by Respondent CWA in representing thousands of employees in different bargaining units in different industries throughout the United States and Canada. Therefore, counsel argues, the information leaves the objector without knowledge as to the cost of negotiating and administering his own collective-bargaining agreement. In these circumstances, counsel further argues, it is impossible for the objector to determine whether the percentage by which his dues have been reduced is reasonable and whether a challenge to the percentage might be successful, and the objector must pay for services seemingly irrelevant to the contract under which he or she receives wages and benefits. Accordingly, counsel for the General Counsel argues, Respon-

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[9]There is nothing in the stipulation of facts as to the amount of the agency fees charged to nonmember employees and, specifically, as to whether the amount varies within industries and between industries.

dent CWA's failure to furnish a unit-by-unit breakdown to objectors and its procedure of charging nonmember employees for representational expenses not attributable to their own bargaining unit represent a breach of Respondents' duty of fair representation owed to nonmembers and are violative of Section 8(b)(1)(A) of the Act.

Recognizing that there is no case precedent under the Act, the legal basis for the General Counsel's theory, underlying the amended consolidated complaint allegations, is *Ellis v. Railway Clerks*, supra. In that seminal decision, involving section 2, Eleventh of the RLA, which authorizes union shop agreements in interstate transportation industries, having previously concluded, in Machinists v. Street, supra, that said provision can not be utilized by a union to expend compelled agency fees on political causes and, in *Railway Clerks v. Allen*, 373 U.S. 113, 121 (1963), that, under section 2, Eleventh, chargeable union expenditures were those "germane to collective bargaining," the Supreme Court was asked to delineate the line between chargeable and nonchargeable union expenditures. The Court first noted that Congress' justification for authorizing the union shop, under the RLA, was "... the desire to eliminate free riders—employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cost thereof." *Ellis*, supra at 447. The Court, then, defined the representational activities for which objecting nonmember employees may be compelled to pay pursuant to a valid union shop provision:

> [W]hen [nonmember employees] object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of

> activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as the exclusive representative of the employees in the bargaining unit.

Id. at 448. Later in Ellis, after analyzing other challenged union expenditures,[10] the Court explained that organizing expenditures are not chargeable to nonmember employees as "[W]here a union shop provision is in place and enforced, all employees in the relevant unit are already organized, by definition, therefore, organizing expenditures are spent on employees outside the collective-bargaining unit already represented" and that, while litigation expenditures, which directly concern bargaining unit members are chargeable, "the expenses of litigation not having ... a connection with the bargaining unit are not to be charged to objecting employees." Id. at 452-453. From the foregoing, counsel for the General Counsel argues that, as regards the RLA, the meaning of Ellis is that a union's obligations must be defined in terms of the bargaining unit and, therefore, it may only charge objecting nonmember employees for representational expenses expended for that unit.

In *Communications Workers v. Beck*, supra, the first—and, to date, only—case, involving a labor organization's right to expend financial core fees under Section 8(a)(3) of the Act, to reach the Supreme Court, 20 nonmember employees challenged CWA's use of their agency fees for purposes other than collective bargaining, contract administration, or grievance adjustment. While not asked to define which types of [9]expenditures could be charged against nonmember employees' fees under said provision, the Court applied the Ellis standards to Section 8(a)(3) and Ellis's rationale in reaching its result. Thus, initially concluding that the latter provision is, "in all material respects identical" to section 2, Eleventh of the RLA (108 S.Ct. at 2648), the Court continued, finding that, in enacting the RLA provision, Congress

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[10]Costs attendant to conventions, which determined as being "essential to the union's discharge of its duties as bargaining agent," social activities, and publications, concerning collective bargaining, contract administration, and employee rights, were deemed, by the Court, to be chargeable expenses.

did not invest unions with unlimited power to expend exacted money and that:

> we have since reaffirmed that 'Congress' essential justification for authorizing the union shop' limits the expenditures that may properly be charged to nonmembers under Section 2, Eleventh to those 'necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative.' *Ellis v. Railway Clerks*. Given the parallel purpose, structure, and language of Section 8(a)(3), we must interpret that provision in the same manner. Like Section 2, Eleventh, Section 8(a)(3) permits the collection of 'periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership' in the union, and ... was designed to remedy the inequities posed by 'free riders' who would otherwise unfairly profit from the [Act's] abolition of the closed shop. In the face of such statutory congruity, only the most compelling evidence could persuade us that Congress intended the nearly identical language of these two provisions to have different meanings.

Id. at 2652-2653. Based upon the above-quoted language, counsel for the General Counsel argues that, "[B]ecause *Beck* directly analogized Section 8(a)(3) of the Act to Section 2, Eleventh of the RLA, the strict bargaining unit standard applied in *Ellis* must likewise be applied under the Act as to extra-unit expenditures."

Counsel for Respondents concedes counsel for the General Counsel's point that "[*Ellis's*] statement of the general standard of chargeability in the [RLA] context applies in the [context of the Act], ... as well ...";[11] however, he disagrees that *Ellis* requires

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[11]While there is probably merit in the argument that the *Ellis* standards, which apply in the RLA context, will apply in cases, as herein involved, arising under the Act, such is not an absolute certainty. Thus, one may legitimately question the assumption that what is accepted as true in the transportation industry is likewise true in an industrial, retail, or construction

unit-by-unit accounting of chargeable expenses or the charging of objecting nonmember employees for only those representational expenses directly attributable to the bargaining unit. Respondents' counsel argues that, in a more recent decision[12] of the Supreme Court, *Lehnert v. Ferris Faculty Assn.*, 111 S.Ct.

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context. For example, the Supreme Court was able to find organizing costs not chargeable in the railroad industry in part based on testimony that the industry is entirely organized and that the organizing of employees in a bargaining unit will result in only an "attenuated" benefit to employees in another unit. *Ellis*, supra at 451-452 and fn. 12. In contrast, it is the common situation, in the industrial context, that represented employees of one employer will be affected by the organizing of employees of a competitor.

[12]Subsequent to *Ellis*, the United States Court of Appeals for the Fourth Circuit decided *Crawford v. Airline Pilots Assn.*, 870 F.2d 155 (4th Cir.1989). Therein, a group of nonmember pilots challenged several expenditures of the Airline Pilots Association (ALPA) as not being germane to collective bargaining and, therefore, not chargeable to agency fee payers on the grounds that said expenses were outside the immediate bargaining unit and also challenged the ALPA's allocation of chargeable expenses on a national basis rather than on a unit-by-unit basis. One court found that ALPA could lawfully charge the nonmember pilots for expenses not directly incurred for their bargaining unit and allocate chargeable expenses on a national basis and that *Ellis* did not require a contrary result. Thus, the court found that ALPA has no locals; that the national union negotiates contracts with the various airlines for the pilots of whom it is the exclusive bargaining representative; that an fees are paid directly to the national union; that bargaining policies are established by the national officers, who negotiate and approve all collective-bargaining agreements; and that, in those circumstances, the objecting nonmembers could not show they did not benefit from outside the immediate bargaining unit expenses. Moreover, the court concluded that *Ellis* did not support the restrictive reading which the objecting nonmembers assigned to it. Thus, the court found that the Supreme Court had analyzed types of union expenditures, but "it did not decide how a national union must allocate the expenditures that are germane to bargaining among the bargaining units it represents." 870 F.2d at 158. The court noted that the Supreme Court found certain types of expenditures, not limited to individual bargaining units, chargeable, including national convention costs. In the above circumstances, the court found that ALPA practices satisfied the *Ellis* test.

1950, 137 LRRM 2231 (1991), the Court clarified its above-described bargaining unit language in *Ellis* and, in so doing, refuted the General Counsel's interpretation of that decision. At the outset, prior to examining the Supreme Court decision in Lehnert, I consider it necessary to analyze the underlying Sixth Circuit Court of Appeals decision, reported at 881 F.2d 1388 (6th Cir.1989), and the opinions therein regarding the *Ellis* bargaining unit language The plaintiffs were faculty members at a publicly financed college[13] and in a bargaining unit, represented

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[13]*Lehnert* involved public sector employees. In two prior decisions, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1976), and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Supreme Court considered the rights of public sector nonmember employees under union-security clauses. Thus, in *Abood*, the Court upheld the constitutionality of the same union-security clause, at issue in *Lehnert*, "thereby approving the union or agency shop in the public sector." *Lehnert*, at 881 F.2d at 1390-1391, and, in Hudson, after citing *Ellis* for the proposition that the union could not constitutionally collect from dissenting nonmember employees any sums for the support of ideological causes not germane to its duties as the employees' collective-bargaining representative, the Court examined the constitutionality of the union-security clause procedures adopted by a public employee union for protecting the right of nonmembers, who wished to object to the uses of their agency fees. For purposes herein, the significance of *Abood* and *Hudson* is that, having arisen in public sector, the Court was faced with First Amendment concerns. While *Ellis* involved construction and interpretation of the RLA and, therefore, statutory considerations, as in the public sector cases, the Court also considered whether the expenses were chargeable under the First Amendment. Id. at 455-457. Contrary to how it decided the RLA and public sector cases, stating that "[W]e need not decided whether the exercise of rights permitted, though not compelled, by Section 8(a)(3) involves state action," the Court, in *Beck*, avoided discussion of any First Amendment issues. *Beck*, supra at 2656. This silence of the Supreme Court, in *Beck*, is significant. Thus, in *Price v. Auto Workers*, 927 F.2d 88 (2d Cir.1991), issued subsequent to *Beck* and decided under Sec. 8(a)(3) of the Act, the court was asked to decide the validity of a rebate procedure for the reimbursement of portions of agency fees to nonmember objectors, and it concluded that the union-shop provision was a product of private negotiations. Therefore, any constitutional claims were invalid due to the absence of state action and none of the accompanying "heightened procedural safeguards" were necessary. Rather, the court held, the only requirement was that the labor organization's procedures met the statutory

by the defendant, [10]a union affiliated with state and national unions. None of the plaintiffs were members of the union and, pursuant to a union-security clause, paid an agency fee to the defendant, portions of which were paid to its state and national organizations. The case arose after the plaintiff faculty members objected that certain of the charges to the agency fee were improper under the standards of *Ellis* and *Abood*, supra, and, as does the General Counsel herein, they argued to the Sixth Circuit that *Ellis* meant that certain of the union's expenditures were nonchargeable as they were for services to employees in other bargaining units. While the dissenting judge agreed that "allowing the union to exact dues from [the objectors] to pay expenses unrelated to bargaining unit negotiations or grievances unjustifiably expands the holding ... in *Ellis*" (881 F.2d at 1395), the majority found this interpretation of *Ellis* "untenable" as the Supreme Court therein found certain union expenses, such as the national convention and entertainment costs, to be chargeable even though other bargaining units participated in and benefited from them (Id. at 1393). Therefore, it appears that, as *Lehnert* came before the Supreme Court, one aspect of the General Counsel's allegations, charging objecting nonmembers for representational expenses not attributable to the bargaining unit, quite clearly constituted the main issue before the Court.

Writing for the majority of the Court, Justice Blackmun characterized the nonmember objectors as asserting that "[T]he local union may not utilize dissenters' fees for activities that, though closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which [they] belong and stated that such a proposition is "foreclosed" by prior decisions. *Lehnert*, 137 LRRM at 2326. Later, while acknowledging that the Court has consistently examined whether nonideological expenses are 'germane to collective bargaining," apparently directing his comments to the plaintiffs' narrow interpretation of *Ellis*, Justice Blackmun stated that "[W]e have never interpreted that test to require a direct relationship between

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duty of fair representation, specifically that they not be arbitrary, discriminatory, or implemented in bad faith. *Price*, supra.

the expense at issue and some tangible benefit to the dissenter's bargaining unit as well" and that "[T]o require so close a connection would be to ignore the unified-membership structure under which many unions ... operate." Id. at 2327. Then, noting that affiliation with a national union results in the availability of resources when the local is in need, Justice Blackmun stated that the portion of the affiliation fee, which contributes to this "pool of resources," is assessed for the entire bargaining unit's protection "[I]f not actually expended on that unit in any particular ... year" and that "[T]he Court recognized as much in Ellis." (Emphasis added.) Id. At this point in the decision, Justice Blackmun clarified any ambiguities, created by Ellis, regarding the chargeability of expenses outside the objectors' bargaining unit:

> We therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its ... national [affiliate], even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit. This conclusion, however, does not serve to grant a local union carte blanche to expend dissenters' dollars for bargaining activities wholly unrelated to the employees' in their unit. There must be some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization. We conclude merely that the union need not demonstrate a direct and tangible impact upon the dissenting employees' unit.

Id. Finally, continuing to write for the majority, Blackmun discussed whether certain specified expenses, such as a public education fund, were chargeable to objectors. Then, writing for the Chief Justice, Justices White and Stevens, and himself, Justice Blackmun discussed litigation expenses, restating the Ellis view that "extra-unit litigation" was akin to nonchargeable lobbying and that "when unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative." *Lehnert*, supra at 2339.

Two courts of appeals decisions, subsequent to Lehnert, are significant for proper resolution of the instant issues. In *PAID v. Air Line Pilots Ass.*, 938 F.2d 1123 (10th Cir.1991), involving Section 2, Eleventh of the RLA, 21 United Airlines pilots, who were not members of the ALPA and who paid agency fees pursuant to a union shop provision, argued that the union impermissible charged them for expenses incurred in activities at other airlines, that there were inadequate procedures for challenging the determinations of their fees, and that its nationwide accounting practice for determining each nonmember's agency fee ("[C]ombining and averaging expenses from all bargaining units rather than by charging employees in each specific bargaining unit only for expenses incurred in representing that unit) was improper. Noting that the substance of the 21 pilots' contentions was that the Supreme Court, in *Ellis*, supra, had made clear that expenses incurred by a union outside of a particular bargaining unit are not considered germane to collective bargaining insofar as the employees in that unit are concerned, the court stated that the above-described *Lehnert* decision clarified whatever ambiguities existed in *Ellis* regarding expenses incurred by a union outside a particular bargaining unit; that the only connection required is that 'there must be some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union ...:" and that that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if not actually expended on that unit in any particular membership year. *PAID*, supra at 1127-1128. Accordingly, noting the record evidence of the effect that negotiations at one airline had upon others, the court concluded that, pursuant to section 2, Eleventh, the union properly charged the 21 pilots for negotiating and administrative expenses outside their airline's bargaining unit and that, given the relationships inherent in [11]ALPA's operations, with a contract negotiated on behalf of one ALPA unit acting as "a bargaining tool" for another unit, the practice of "determin[ing] the plaintiff's agency fee by pooling the negotiating expenses of these units and dividing the costs among the represented employees" does not run afoul of Ellis." Id. In the latter regard, the court further noted that the spreading of administrative costs contributes to the "pool of

resources potentially available to each affiliated bargaining unit." Id. at 1129. The second post *Lehnert* decision, *Kidwell v. Communication Workers*, 946 F.2d 283 (4th Cir.1991), also involving section 2, Eleventh of the RLA, was filed by union members, who attacked the extra bargaining unit expenses, which comprised a portion of their union dues. Insofar as is pertinent herein, one aspect of the members' allegations concerned categories of chargeable expenses and an argument that their union used a forced cross-bargaining unit subsidization concept rather than basing the charges on the actual bargaining unit. Dismissing the plaintiffs' argument, the court, citing *Lehnert* with regard to "cross-subsidization," stated, "*Lehnert* found that 'a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and local affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit.'" *Kidwell*, supra at 304.

Adhering to his interpretation of *Ellis* and contrary to counsel for Respondent, counsel for the General Counsel contends that nothing in the language of the Supreme Court, in *Lehnert*, mandates dismissal of the amended consolidated complaint allegations herein involved. Rather, counsel argues, *Lehnert* merely involved the chargeability of only that portion of a nonmember's agency fee which constituted per capita payments to state and national organizations, and, therefore, it should be narrowly construed in a manner limiting the decision to its facts. I disagree. At the outset, of course, there is simply nothing in Justice Blackmun's decision, in *Lehnert*, limiting its meaning to the facts of that particular case. Contrary to counsel for the General Counsel, in light of my above discussion of that decision, I believe that everyone involved, including the litigants, the judges of the Sixth Circuit Court of Appeals, and the Justices of the Supreme Court, understood that the central issue was the meaning of the assertedly ambiguous language of the Court in *Ellis* and that such was addressed, in detail, by all. In particular, I believe that Justice Blackmun's opinion explicitly set forth the majority's explication of the broad meaning of the *Ellis* decision and such was his clear and obvious intent. Support for my view is found in the subsequent decisions of the Courts of Appeals in

PAID, supra, and *Kidwell*, supra. As I delineated above, both courts interpreted *Lehnert* as broadly defining the meaning of *Ellis*, and neither considered *Lehnert* as having a more limited, factual focus. With regard to *PAID*, counsel for the General Counsel argues that, inasmuch as the structure of the ALPA is unique (with no locals, with all dues and fees paid to a national organization which negotiates all collective-bargaining agreements, and with national officers), section 2, Eleventh decisions involving that union are of limited precedential value. While I believe that counsel, to a certain extent is correct, I note that the court, in *Kidwell*, interpreted *Lehnert* in the same broad manner, and there is nothing in the record to establish that the union, involved therein, was structured similarly to the ALPA. Finally, counsel for the National Right to Work Legal Defense Foundation, who supports the General Counsel's view of *Ellis*, argues that the bargaining unit concept is at the heart of the Act and that the Board and the Supreme Court, in dealing with issues related to collective bargaining and the duty of fair representation under the Act, have always focused upon the concept of the appropriate unit or the bargaining unit. Counsel is, of course, correct that the Board and the courts, including the Supreme Court, have traditional stressed the concept of appropriate unit in bargaining and duty of fair representation cases; however, there is no Board decisional law on the exact points at issue herein, and Justice Blackmun's language, in *Lehnert*, gave a broad meaning to the Court's language in *Ellis*. In these circumstances, while I believe that the General Counsel's stated view of *Beck*, supra, is correct—that, given the statutory equivalency of section 2, Eleventh of the RLA and Section 8(a)(3) of the Act, the Supreme Court's decisions defining the scope and meaning of the former are binding upon similar issues relating to the latter and that no matter how distant from the traditional view of the Act, I also believe that dictates of *Lehnert* must govern in considering issues arising under *Beck*.

Utilizing the above principles, I find no merit to the General Counsel's contention that Respondents breached their duty of fair representation by charging objecting nonmembers for representational expenses not attributable the unit in which said objectors are employed. As explained by the Supreme Court, in *Lehnert*

and as set forth above, it "never interpreted" its prior holdings to "require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit;" rather, the Court merely requires that the fee be for services that "... ultimately enure to the benefit of the members of the local union." Accordingly, I view *Beck*, supra, as permitting a labor organization, which is party to a collective-bargaining agreement containing a union security clause enacted pursuant to Section 8(a)(3) of the Act, consistent with the guidelines established in *Lehnert*, to charge nonmember bargaining unit employees for representational expenses not directly attributable to their own bargaining unit. That this conclusion is correct is illustrated by the internal structure of CWA. Thus, the national union acts as the recognized bargaining representative for all employees; the labor organization's president is responsible for all collective bargaining; CWA holds telecommunications industrywide conferences to discuss nation-wide bargaining goals; the CWA research department assists local bargaining committees in drafting contract proposals and counterproposals; CWA's executive committee must approve all strikes and terminations of strikes; and CWA provides financial assistance to strikers. Thus, surely a portion of each nonmember's agency fee contributes to the "pool of resources" potentially available for the protection of each bargaining unit. Id. at 2327. In these circumstances, as Respondent CWA is the exclusive bargaining representative of employees in the bargaining unit, of which Michael Lee Finerty is a member, as a general practice, it did not breach its duty of fair representation, in violation of Section 8(b)(1)(A) of the Act, by [12]charging him for representational expenses[14] incurred outside his Pacific Bell/Nevada Bell bargaining unit, and I shall

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[14]The chargeability of specific representational costs, such as contract negotiation or administration costs involving a bargaining unit in another industry, is not at issue herein. As the amended consolidated complaint allegation appears to have been pled in the abstract, I have decided it in that manner.

recommend that paragraph E11(i) of the amended consolidated complaint be dismissed.[15]

As to whether Respondent CWA violated Section 8(b)(1)(A) of the Act by allocating chargeable and nonchargeable expenses based on all its expenditures and failing to break down its expenditures into representational and nonrepresentational categories on a unit-by-unit basis, it may be persuasively argued that, under the Act, a labor organization's duty of fair representation, which is owed to objecting nonmembers, normally includes keeping them informed as to the cost of negotiating and administering the collective-bargaining agreement, which establishes their wages and benefits. However, there is, of course, no case precedent, under the Act, on this point, and neither *Ellis* nor *Lehnert* directly concerns this issue. Rather, as the court noted in *Crawford*, supra, the Supreme Court cases have involved the types of expenditures, which can be charged against nonmembers' fees, and not how a collective-bargaining representative must allocate representational expenses. Nevertheless, as I believe such are applicable in similar cases under the Act, certain discernable principles in *Ellis* and in *Lehnert* mandate the conclusion that a labor organization does not, in all circumstances, act in breach of its statutory duty of fair representation to objecting nonmembers by not allocating chargeable expenditures on unit-by-unit basis. Thus, in *Ellis*, the discussion of such expenditures was not limited to individual bargaining units, and, in Crawford, supra, the court stated that "[T]he distinction the [Supreme] Court drew was between the types of expenditures—not whether the cost should be allocated to the specific unit in which the employees worked." Id. at 159. The Supreme Court elaborated on this point in *Lehnert*, stating that it had never interpreted the test for germane expenses to require a

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[15]Counsel for the General Counsel requests that, given the factual stipulation that Respondent CWA charges objecting nonmembers for the cost of litigation expenses, in connection with collective bargaining, which have been incurred outside their bargaining unit, I find that such practice is violative of the Act. Inasmuch as such is not specifically alleged as an unfair labor practice in the amended consolidated complaint, I shall decline to do so.

direct relationship between the expense at issue and some tangible benefit to the objector's bargaining unit. *Lehnert*, supra at 2327. It follows, I believe, that the only such connection, which the Court would require, is that the expense must "ultimately enure to the benefit" of the objector's bargaining unit. Id. at 2328.

From the foregoing, I am convinced that, as under the RLA, in certain circumstances, the Act permits nationwide cost allocations of representational expenses. Thus, in light of the *Lehnert* standards, given that the Airline Pilots Association negotiates contracts with the various airlines directly rather than through locals, that bargaining policies are established by national officers, who must approve all negotiations and contracts, and that bargaining at one airline is directly affected by, and directly affects, bargaining at other airlines, the Tenth Circuit Court of Appeals correctly interpreted *Ellis* and *Lehnert* as permitting the ALPA to pool the representational expenses of its various bargaining units and to divide the costs among the represented employees. *PAID*, supra, and I think the same result would hold under the Act. However, while CWA asserts that, as a national labor organization, it, likewise, should be allowed to continue to allocate representational costs on a national rather than unit-by-unit basis, there is a significant representational difference between the two organizations. The stipulated evidence herein is that CWA represents thousands of employees in many different industries. Thus, while one justifiably may argue, in regard to the ALPA, which represents employees in just one industry, that whatever affects bargaining unit employees at one company would have the identical effect upon bargaining unit employees at another company, the identical argument carries little, if any, sway with regard to CWA, which represents employees in many different industries. Put another way, it is difficult to believe that Pacific Bell/Nevada Bell contract negotiations, involving telecommunications employees, would have any affect upon, or would be affected by, negotiations involving the Chicago Tribune Company typographical workers bargaining unit or a bargaining unit in the health care industry. Absent the relationship existing between bargaining units in the same industry, as in the ALPA situation, there can be no finding that representational costs,

affecting one bargaining unit, will ultimately enure to the benefit of members of another bargaining unit so as to permit CWA to allocate costs on a national, multiple industry basis without violating its duty of fair representation to objecting nonmembers. Counsel for Respondents argues that it would be impossible to identify a chargeable task as benefitting a particular bargaining unit; that, as CWA represents 2400 bargaining units, unit-by-unit accounting would require dividing chargeable expenditures into an equal number of categories; that a presently unknown "formula" would have to be devised to accomplish the task; and that the accounting cost incurred would be an unreasonable burden. While I have sympathy for such arguments, it must be pointed out that CWA's current allocation procedure appears to have been instituted on its own volition presumably with complete cognizance of a potential challenge and that, as noted by the Second Circuit Court of Appeals in *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir.1987), "excessive cost cannot form the basis for allowing the union ... to avoid [the] requirement that the procedures used by the union to allocate bargaining and administrative costs be carefully tailored to minimize the intrusion on the nonmembers' rights." Id. at 339.[16] In these circumstances, I believe that, by relying upon a single percentage reduction, determined on a nationwide basis, for objecting nonmembers, Respondents' multiple industry allocation system fails the *Beck*, supra, requirement, that, under the Act, an objecting nonmember may only be charged for those expenditures necessary for the labor organization's performance of the duties of an exclusive bargaining representative, and that, therefore, Respondents have acted in violation of Section 8(b)(1)(A) of the Act with regard to the objecting nonmembers herein involved.

[13]CONCLUSIONS OF LAW

1. Pacific Bell, Nevada Bell, AT&T Information Systems, New York Telephone Company, Bell Telephone Company of

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[16]While Andrews was decided upon First Amendment principles and such reasoning may not be applicable to cases decided under the Act, I believe the court's logic is equally applicable herein.

Pennsylvania, American Telephone and Telegraph Communications, Ohio Bell Telephone Company, Chicago Tribune Company, The Pulitzer Publishing Company d/b/a The St. Louis Post-Dispatch, GTE California Incorporated, U.S. West Communications, and Wisconsin Bell, Inc. are employers engaged in commerce and in industries affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

3. Since 1986, Respondents have breached their duty of fair representation in violation of Section 8(b)(1)(A) of the Act by, after breaking down the agency fee, charged to the objecting nonmembers named in the amended consolidated complaint, into representational and nonrepresentational expenses, allocating chargeable expenses on a national rather than unit-by-unit basis on the disclosure statements given to said individuals.

4. Respondents did not act in violation of Section 8(b)(1)(A) of the Act by charging objecting nonmembers for representational expenditures not directly attributable to their own bargaining units.

5. The aforementioned unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having determined that Respondents engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act by allocating representational expenses, charged to the objecting nonmembers named in the amended consolidated complaint, on a national rather than unit-by-unit basis, I shall order Respondents to cease and desist from CWA's present national cost allocation procedure and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. As I believe Respondent's duty of fair representation owed to each of the objecting nonmembers, named in the amended consolidated complaint, includes allocating the percentage of each nonmember's agency fee, expended on representational matters, on a unit-by-unit basis, I shall recommend that Respondents be ordered to recalculate the amount of agency fees, chargeable to each of the named objecting nonmembers, commencing in the

year he or she initially objected to the payment of his or her agency fee for nonrepresentational activities, as alleged in the amended consolidated complaint, and continuing for each subsequent year he or she filed such an objection until the present, by reallocating chargeable representational expenditures on a unit-by-unit basis for the years in question. Thereupon, each named objecting nonmember should be reimbursed for any excess fees paid to Respondents, with interest calculated as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), for the years in question. Finally, I shall recommend that Respondents be ordered to post notices, setting forth their obligations.

On the foregoing findings, conclusions, and on the entire record, and pursuant to the provisions of Section 10(c) of the Act, I issue the following[17]

ORDER

Respondents (Respondent CWA; Respondent CWA Locals 1101, 1104, 1113, 1114, 1123, 13000, 4322, 4340, 4603, 7640, 9403, 9510, 9573, and 9588; Respondent Typographical Union; and Respondent Mailers Union), their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Breaching their duty of fair representation by, after breaking down the agency fee, charged to objecting nonmembers, into representational and nonrepresentational expenses, allocating chargeable expenses on a national rather than unit-by-unit basis on the disclosure statements given to said individuals.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[17]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Recalculating the amount of agency fees, chargeable to each of the objecting nonmembers, named in the amended consolidated complaint, commencing in the year he or she initially objected to the payment of his or her agency fee for nonrepresentational activities, as alleged in the amended consolidated complaint, and continuing for each subsequent year he or she filed such an objection until the present, by reallocating chargeable representational expenditures on a unit-by-unit basis for the years in question. Thereupon, each of the objecting nonmembers shall be reimbursed, with interest, for any excessive fees paid to Respondents for the years in question.

(b) Preserve and, upon request, make available to Board agents, for examination and copying, all records necessary to verify the amounts of reimbursement due to each of the objecting nonmembers as set forth above.

(c) Post at the meeting hall and/or office of Respondent CWA, each of the Respondent CWA Locals, Respondent Typographical Workers, and Respondent Mailers, copies of the attached notice, marked "Appendix."[18] Copies of the notice, on forms furnished by the Regional Director of Region 20, after being signed by the authorized agent for the Respondents, shall be posted by each of the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including places where notices to members and nonmembers are customarily posted. Reasonable steps shall be taken by each of the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In addition, sufficient notices shall be made available to each employer, set forth in the amended consolidated [14]complaint, for posting at the work location of each of the named objecting nonmembers—if said employers are so willing.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[18]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT SHALL BE FURTHER ORDERED that the amended consolidated complaint, insofar as it alleges that Respondents violated Section 8(b)(1)(A) of the Act by charging objecting nonmembers for representational expenditures not directly attributable to tl.eir own bargaining units, be dismissed.

Dated: May 11, 1993

APPENDIX

NOTICE TO MEMBERS AND NONMEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT breach our duty of fair representation by, after breaking down the agency fee, charged to objecting nonmembers, into representational and nonrepresentational expenditures, allocate chargeable expenses on a national rather than unit-by-unit basis on the disclosure statements, which we give to objecting nonmembers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse, with interest, the objecting nonmembers, set forth in the attachment, for any excess fees paid to us in the years, at issue, in which objections were filed to their agency fee payments.

COMMUNICATION WORKERS OF AMERICA,
AFL–CIO

ATTACHMENT

Accetta, Eileen
Anderson, Floyd
Brown, Janet
Browne, Robert P.
Cabot, James
Caparoni, James
Connie, Albert
Lucken, John
Macko, John
Marcin, Mark
Mayer, Carolyn
McClain, David
Mechling, Rick A.
Miller, Daniel

Corey, Janet
DiGiammo, Andy
Dilly, Diane
Dow, Irene
Dow, Ross A.
Elton, Harry
Faison, Erskine
Falvo, Roger
Finerty, Michael
Fitzpatrick, S.K.
Foley, James
Glasscock, Sandra
Golaszewski, Robert
Goodreau, John
Hettick, Lynne P.
Hill, Ednoa
Hurley, Terrence
Johnson, Dennis L.
Kase, Charleton
Kline, Richard D.
Kollman, Fridrich
Krom, Robert
Lawrence, Timothy L.
O'Tolle, Vivienne
Pall, Edward
Peck, William E.
Pedrick, Wesley
Peterson, Greg
Pogras, James A.
Posey, Ernest
Praul, Charles
Ritter, James S.
Scott, Ida
Shaw, Hoyt
Shaw, Jeanene
Stewart, Pauline W.
Stork, Michael F.
Taylor, Kendall
Utt, Jesse
Vanderhayden, Laura
Vilensky, Janice
Viiensky, Lanny
Walp, Diane
White, Michele
Williams, Thomas
Zawatske, Richard W.

ORDER

On May 13 and June 15, 1992, I approved unilateral settlement agreements in the above-captioned matters with the proviso that, if any of the objecting nonmembers, named in the amended consolidated complaint, disputed the Regional Director of Region 20's reimbursement calculations or the amount of reimbursement, he or she should file a proper motion and I would consider the matter. A time limit of April 26 was set for the filing of such motions, and *only* the Charging Party in Case 20-CB-8752-2, James S. Ritter, has requested that I review the reimbursement in his case, as calculated by the aforementioned Regional Director. I have done so, and it is apparent that Ritter's arguments, with regard to the reimbursement calculation, merely reiterate his previous objections to the settlement agreement itself—that there is no remedy for assertedly unlawful conduct,

which occurred more than 6 months prior to the filing of his underlying unfair labor practice charge on January 16, 1990. As I explained in my order, dated May 13, 1992, "... there can be no question herein but that, at all times material herein, [Ritter] has been an employee within the meaning of the Act, and I can see no valid reason why the [Section 10(b) statute of limitations] should not apply to him." Therefore, I find his objections to the calculation of his settlement reimbursement to be without merit. In the above circumstances, inasmuch as the time for the filing of objections has passed:

It is hereby ordered that the reimbursement amounts in the settlement agreements in the above-captioned matters are, and remain, as calculated by the Regional Director of Region 20.

Dated: May 11, 1993

ORDER REGARDING PROPOSED UNILATERAL SETTLEMENT AGREEMENTS

On April 15, 1992, Administrative Law Judge Burton Litvack telephonically opened the hearing in the above-captioned matters, with all parties represented by counsel except the Charging Party, James S. Ritter, an individual, in Case 20-CB-8752-2, who represented himself. All parties requested that Judge Litvack open the hearing in the manner so that 14 unilateral settlement agreements, General Counsel's Exhibits 3-16, could be received into the record and then be considered, by Judge Litvack, for approval or rejection. Each of the unilateral settlement agreements, with the exception of General Counsel's Exhibit 4, involving Case 20-CA-24168 and The Bell Telephone Company of Pennsylvania, contains four documents—the settlement agreement, a stipulation, a notice pertaining to the particular amended consolidated complaint paragraphs at issue, and a so-called "national notice" pertaining to paragraph E of the amended consolidated complaint and the common nationwide allegations contained therein. The settlement agreement in Case [15]20-CA-24168 contains only the settlement agreement and an attached notice. All parties understand and agree that, if approved by Judge Litvack, the unilateral settlement agreement in Case 20-CA-24168 would fully remedy and dispose of the

unfair labor practice allegations therein and that, if approved, the remaining settlement agreements would resolve all of the unfair labor practice allegations in the remaining cases except the so-called "unit-by-unit" allegations contained in the above- noted paragraph E, issues which, all parties agree, necessitate litigation. Asserting that each of the proposed unilateral settlement agreements remedies the allegations of the amended consolidated complaint paragraph, to which it is addressed, counsel for the General Counsel argues that each should be approved by Judge Litvack. Likewise, counsel for The Bell Telephone Company of Pennsylvania, the respondent in Case 20-CA-24168, and counsel for Communications Workers of America (CWA) argue in favor of the approval of the settlement agreements. On the other hand, James S. Ritter, the Charging Party in Case 20-CB-8752-2; counsel for the Chicago Tribune Company (the Tribune), the Charging Party in Case 20-CB-8752-16, and counsel for the National Right To Work Legal Defense Foundation, Inc. (the Foundation), which represents the Charging Parties in the remaining cases, contend that Judge Litvack should reject the proposed unilateral settlement agreements for various reasons, which shall be set forth and considered later.

At the outset, there is no dispute that the basis of the instant amended consolidated complaint is the decision of the United States Supreme Court in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), in which the Court concluded that Section 8(a)(3) of the National Labor Relations Act (the Act) and Section 2, Eleventh of the Railway Labor Act (the RLA) have "parallel purpose, structure, and language" and, therefore, should be construed "in the same manner," and, utilizing an earlier decision, *Machinists v. Street*, 367 U.S. 740 (1961), which involved Section 2, Eleventh of the RLA, as precedent, ruled that Section 8(a)(3) of the Act "authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor- management issues.' " Based upon *Beck* and Supreme Court precedent in cases involving the RLA and others concerning public sector employees, on November 15, 1988, the General Counsel issued "Guidelines" as to how the office of the General Counsel would handle *Beck*-related unfair labor practice charges.

The document forms the underlying rationale for the instant amended consolidated complaint.

Against the above-described background, with no other Supreme Court precedent, involving the Act, and no decisions of the National Labor Relations Board (the Board), on the *Beck* issues, we must consider the 14 proposed unilateral settlement agreements. Initially, it should be clear to all parties that the Board's longstanding policy is to encourage the settlement of unfair labor practice charges (*Nu-Aimco, Inc.*, 306 NLRB 978 (1992), and, in determining whether the purposes and the policies of the Act would be effectuated by approval of settlement agreements, the Board has developed certain standards including (1) whether the parties have agreed to be bound and the position taken by the General Counsel; (2) whether the settlement appears reasonable in light of the complaint allegations and the risks inherent in litigation; (3) whether there has been any coercion, fraud, or duress by any party in reaching the settlement; and (4) whether the respondent has a history of violations of the Act or of breaching settlement agreements. *Shine Building Maintenance*, 305 NLRB 478 (1991); *National Telephone Services*, 301 NLRB 1 (1991); *Independent Stave Co.*, 287 NLRB 740, 743 (1987). Herein, there is no dispute that the allegations of the amended consolidated complaint and the remedy provisions of the document are based upon the aforementioned "Guidelines" of the General Counsel in *Beck*-related cases and that, in those cases in which CWA and its local unions are the respondents, the language of both the national and local notices is framed in the terms of the allegation paragraphs of the amended consolidated complaint. Thus, the central requirement of the General Counsel's *Beck* "Guidelines" is the obligation of a labor organization, which has a union-security provision in a collective-bargaining agreement with an employer, to notify nonmembers that, during the past year, a stated percentage of funds was spent in nonrepresentational activities; that nonmembers can object to having their union-security payments spent on such activities; that objectors will only be charged for representational activities; and that, if they object, nonmembers will be provided with detailed information concerning the breakdown between representational and nonrepresentational expenditures. According to the General

Counsel's *Beck* theory, the notice must be given once a year to nonmembers, to nonmember new employees who join the unit after the notice, and to employees who resign their memberships in the labor organization. It is further postulated that, once a nonmember objects, the labor organization must refrain from charging him for nonrepresentational functions.

Analysis of the amended consolidated complaint discloses that the allegations of paragraphs E through R concern such allegedly unlawful conduct as failing to give the required *Beck* notice to nonmembers; failing to give a properly worded *Beck* notice to nonmember employees, failing to honor resignations from the labor organization and continuing to assess full membership dues amounts from resigning employees, who have subsequently filed *Beck* objections; failing to recognize and grant objector status to nonmember employees who have, in fact, submitted *Beck* objections and continuing to assess them for full membership dues; demanding that employers honor contractual union-security clauses and terminate nonmember employees who have either not been given a proper *Beck* notice or who have submitted *Beck* objections and are not paying full membership dues; and not providing to nonmembers, who have filed *Beck* objections, with sufficient breakdowns of representational and nonrepresentational expenses. In remedying these unfair labor practices, the national and local notices, attached to the various proffered unilateral settlement agreements, involving CWA, contain provisions which track the language of the applicable amended consolidated complaint paragraphs and which state CWA's commitment to desist from engaging in any like future conduct including to not fail to give nonmember employees proper *Beck* disclosure notices, to not refuse to permit nonmember employees to raise *Beck* objections, to not refuse to honor such objections when filed, and to no longer demand that employers terminate employees who fail to pay full union-security payments at times when the nonmember employees were not afforded their full rights under *Beck*. Further, CWA has agreed, where applicable, to provide for the [16]reimbursement of those portions of nonmember employees' union-security fees, which were not spent on representational activities in the years in which the nonmembers were *Beck* objectors, and, besides

agreeing to post copies of the national and applicable local notices at its national office, at the offices of the respondent local unions, and, wherever possible, at the worksites of named employees, CWA has committed to the publishing of a new *Beck* notice, which, apparently, conforms in all aspects to the requirements of the General Counsel, in the *CWA News*, copies of which are mailed to each employee for whom CWA is the statutory bargaining representative.

The foregoing has convinced Judge Litvack that the proffered unilateral settlement agreements substantially remedy the unfair labor practice allegations of the amended consolidated complaint. In addition, other factors tend to buttress the conclusion that the settlement agreements satisfy the Board's standards for approval. First, there is a substantial possibility that the General Counsel will not entirely succeed in litigation of his unfair labor practice allegations. Thus, as the General Counsel pointed out in the aforementioned *Beck* "Guidelines," the cases, upon which reliance has been placed for formulation of the theory underlying the amended consolidated complaint, are ones involving the RLA or public sector employees and having constitutional bases. In cases, such as *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), and *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Court determined that present in each was the factor of "state action" so as to cause the involved labor organization's conduct to be subject to constitutional limitations. This matter is of crucial significance, for, absent state action, there would be no necessity for imposing the "heightened procedural safeguards" required when concerned with rights which are protected by the Constitution, and a labor organization's obligation, in matters involving *Beck* rights, only would be to meet the less stringent duty of fair representation standard of *Vaca v. Sipes*, 386 U.S. 171 (1967); *Price v. International Union, UAW*, 927 F.2d 88, 91 (2d Cir.1991). In *Beck*, supra, the Suprene Court specifically declined to consider the issue, and two circuit courts of appeals have, since then, concluded that no state action is involved with the acts of labor organizations, under Section 8(a)(3) of the Act, and that, therefore, the procedures utilized to enforce nonmembers' *Beck* rights need only not bearbitrary, discriminatory, or implemented in bad faith in order tobe found lawful. *Price*, supra; *Abrams v.*

Communications Workers, 702 F.Supp. 920 (D.D.C.1988), affd.mem. 884 F.2d 628 (D.C.Cir.1989). Accordingly, given the novel legal concepts involved and the lack of clearly applicable case precedent, that the General Counsel would prevail in the instant litigation is not free from doubt.

Next, in a related factor, it must be noted that CWA entered into the above-described settlement agreements prior to the commencement of the hearing and at a time when its legal liability could not be said to be free from doubt and, by doing so, obviously waived its right to raise legal arguments, such as stated above, and to fully litigate the unfair labor practice allegations. Whatever CWA's motivation for entering into these settlement agreements, the fact that it has done so, in the above circumstances, militates towards acceptance of the settlements. Moreover, of course, the General Counsel recommends approval for the reasons stated above. Further, there has been no assertion of fraud, coercion, or duress by any party in reaching agreement on the proffered settlement agreements, and there has been no assertion that CWA has a history of breaching settlement agreements.

Turning to the settlement agreement in Case 20-CA-24168, in which The Bell Telephone Company of Pennsylvania is the named respondent, the same factors, which militate toward acceptance of the settlement agreements, in which CWA is the named respondent, exist. Thus, the amended consolidated complaint allegations are that the former, herein called Pennsylvania Bell, continued to deduct an employee's full membership dues from his wages and remit the monies to CWA even after the employee had resigned his union membership, thereby revoking a previously executed dues deduction authorization. Pursuant to the terms of the settlement agreement and attached notice, which will be posted in accord with standard Board procedures, Pennsylvania Bell has agreed to no longer engage in such conduct in the future and to notify the employee, in writing, of the commitment. While there exists no make-whole provision in the settlement agreement, it is noted that, in the companion CWA settlement agreement, General Counsel's Exhibit 3, the labor organization has agreed to accept liability for reimbursing to the

employee that portion of his union-security payment spent on nonrepresentational activities. Furthermore, there can be no doubt that the primary theory of liability concerns CWA rather than Pennsylvania Bell, and, in light of the arguably tenuous nature of the General Counsel's legal theory, there exists doubt that he can prevail as to allegations that Pennsylvania Bell's above-described conduct was violative of Section 8(a)(1) and (3) of the Act. In these circumstances, it must be noted that Pennsylvania Bell entered into the proffered settlement agreement with the General Counsel prior to litigation and that the General Counsel recommends approval. Finally, as above, there exists no assertion of fraud or duress or that Pennsylvania Bell has acted in breach of prior Board settlements.

The Tribune and the Foundation have filed similar general objections to approval of the CWA settlement agreements, and the Foundation and James S. Ritter have stated specific objections to the terms of some of the CWA's settlements. Initially, counsel for the Tribune and counsel for the Foundation contend that the proposed settlement agreements do not fully remedy CWA's unlawful conduct inasmuch as "relief" has only been provided for those financial core members specifically mentioned in the amended consolidated complaint and not for an unspecified number of "similarly situated" employees, who may have been harmed by CWA's alleged unfair labor practices. As explained by counsel for the Tribune, the proposed national notice expressly acknowledges that certain expenses, which had previously been portrayed as representational by CWA, are, in fact, nonrepresentational, and financial core employees, in the past, may have detrimentally relied on these misrepresentations in deciding whether or not to become *Beck* objectors. Both counsels assert that, while the scope of the "class" may be debatable, the existence of individuals similarly situated to those named in the amended consolidated complaint can not be doubted. In assessing the validity of counsels' contentions, it is crucial, at the outset, to understand that it is the General Counsel "... determines whether to issue a complaint and the theory on which it should proceed" and that "... a charg[17]ing party cannot enlarge upon or change the General Counsel's theory." *Container Systems Corp. v. NLRB*, 521 F.2d 1166, 1170 (9th

Cir.1975); *Kimtruss Corp.*, 305 NLRB 710 (1991). Herein, according to counsel for the General Counsel, the fact that a remedy is being sought for only those financial core members named in the complaint reflects the theory of the General Counsel that financial core members have an affirmative obligation to file their *Beck* objections, through CWA's "established procedure," on a yearly basis, in order not to be obliged to tender full union-security monies and that, while CWA's current notice procedure is viewed as inadequate, such inadequacies are not "so serious" as to relieve financial core members of their responsibility to file *Beck* objections each year. As pointed out by counsel for the General Counsel, adopting the Charging Parties' contention, as described above, would, in effect, establish that CWA's notice procedures were so deficient as to have relieved all past and present financial core members of the obligation to object—a theory not supported by the amended consolidated complaint. Counsel for the Chicago Tribune and counsel for the Foundation point to the Board's decision in *Ironworkers Local 433 (Reynolds Electrical & Engineering Co.)*, 298 NLRB 35 (1990), as support for their argument that, contrary to counsel for the General Counsel, the Board will provide remedies for unnamed discriminatees "similarly situated" to those named in the complaint. However, both in *Ironworkers Local 433* and another cited decision, *Woodline Motor Freight*, 278 NLRB 1141 (1986), the Board provided relief for individuals, who were not named in the underlying complaints, only after finding that the allegations of the complaints were sufficiently broadly worded so as to include unnamed, similarly situated employees and that the respondents were on notice that the complaints were not limited to those discriminatees named therein. 298 NLRB 35, 36; 278 NLRB 1141, 1143 at fn. 6. The holdings were, thus, fully in accord with other Board decisions in which complaints were *not* construed so as to include unnamed discriminatees. *O'Neill, LTD*, 288 NLRB 1354, 1356 (1988); *TLI, Inc.*, 271 NLRB 798, 806 (1984); *Consolidated Casinos Corp.*, 266 NLRB 988 (1983). Herein, of course, the amended consolidated complaint allegations are narrowly drawn, specifying the individuals who were harmed by CWA's conduct, and the Charging Parties have long been on notice that the language should be construed narrowly. Finally, Judge Litvack notes that, while this contention

of counsel for the Tribune and counsel for the Foundation may have some factual validity, for purposes of considering the proffered settlement agreements, the language of the amended consolidated complaint allegations and the underlying legal theory dictate for whom relief may be sought in settlement. In these circumstances, noting that the named objectors will receive reimbursement, the above-stated objection must be found to be without merit.

The Charging Parties' next general objection to the proffered unilateral CWA settlement agreements is based upon the contention that the remedies, obtained in the settlements, do not provide "full relief" for those financial core members named in the amended consolidated complaint. Thus, while the notices provide for reimbursement for the year in which *Beck* objections were raised, as well as in subsequent years in which there were *Beck* objections, as a practical matter, none of the named financial core members raised the objections in the years subsequent to the filing of the unfair labor practice charges herein and are not entitled to "post-complaint relief for 'related violations.'" As support for their argument that such relief is warranted, counsel for the Tribune and counsel for the Foundation cite to *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959). In that case, a Section 8(a)(1) and (5) unfair labor practice charge was filed with the Board, alleging a failure and refusal to bargain in good faith. Five months later, the employer granted a general wage increase to employees, and a subsequent complaint alleged both the bargaining and wage increase as unfair labor practices without the filing of a new or an amended unfair labor practice charge. The issue raised was whether or not the wage increase was properly included as a subject of the complaint, and the Supreme Court ruled that "whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." Id. at 306-307. It seems to Judge Litvack that the salient point of the foregoing holding is that the subsequent conduct must itself constitute an unfair labor practice in order for such to be a subject of a

complaint and to require relief. As understood by Judge Litvack, one aspect of the General Counsel's theory, underlying the amended consolidated complaint, is that a financial core member bears the burden of objecting to the expenditure of funds for nonrepresentational purposes in any given year, and, if he fails to do so, the labor organization may collect full union-security monies from the individual that year. It follows, as pointed out by counsel for the General Counsel, that, if a financial core member failed to object in any year subsequent to that alleged in the amended consolidated complaint, pursuant to the underlying theory, he would not be considered a *Beck* objector during the year, and CWA has not committed an unfair labor practice by not adhering to the *Beck* procedures during the year. It is quite apparent that, to find merit to the Charging Parties' objection, would necessitate establishing an underlying theory different from that of the General Counsel with regard to the establishing of unfair labor practices herein. However, I have previously concluded that the selection of the theory, underlying the instant amended consolidated complaint, is exclusively within the purview of the General Counsel (*Container System Corp.*, supra; *Kimtruss Corp.*, supra), and the Charging Parties may not require him to alter it.[1] Moreover, while it is not inconceivable that the Charging Parties' view of the law may be correct, Judge Litvack is of the view that, at this point in the proceeding, his function is merely to establish whether the settlement agreements ade[**18**]quately remedy the allegations of the amended consolidated complaint and not to weigh the merits of the underlying legal theory. In this regard, it must be noted that the language of

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[1]Counsel for the Foundation points to language in a footnote in *Railway Clerks v. Allen*, 373 U.S. 113 (1963), as support for its contention regarding the inadequacy of the underlying legal theory. Referring to the timing of an objection, the Supreme Court said, "Respondents first made known their objection to the petitioners' political expenditures in their complaint filed in this action; however, this was early enough." Id. at 119 at fn. 6. From this, counsel asserts that there is no difference between the filing of a meritorious complaint in court and a meritorious charge before the Board and apparently that additional acts need not be undertaken in order to perfect further *Beck* violations.

the settlement agreements provide for reimbursement in the years in which nonmembers filed *Beck* objections and CWA followed improper *Beck* procedures and would remedy such conduct in subsequent years if proper *Beck* objections were filed. Based upon the foregoing, this objection to the proposed settlement agreements must be rejected.

The Charging Parties next object to the inclusion of nonadmission clauses in the proposed settlement agreements. In arguing against acceptance, counsel for the Tribune asserts that inclusion of such language is inappropriate herein inasmuch as the alleged unfair labor practices are "particularly egregious" and as CWA has continued to infringe upon the rights of nonmembers since the *Beck*, supra, decision, to which it as a party, and counsel for the Foundation contends that the nonadmissions language is "unwarranted" when, as herein, perhaps many thousands of identical unfair labor practices, as herein involved, are committed by CWA every year and the latter has exhibited an "established proclivity" for the allegedly unlawful conduct herein involved. Putting aside counsels' hyperbole, the facts are that not only, as stated above, is the theory underlying the amended consolidated complaint open to question but also counsel for the General Counsel stated, in their brief in support of acceptance of the settlement agreements, that the General Counsel does not view the inadequacies of CWA's annual *Beck* notice as being "so serious." Moreover, contrary to the assertions and the conjecture, there just has been no showing that CWA is a chronic violator of the Act or has acted in breach of settlement agreements in the past. In the foregoing circumstances, noting that the terms of the settlement seem to adequately remedy the alleged unfair labor practices, it would be a proper exercise of discretion to accept the proposed settlements with the inclusion of the nonadmission clauses. *Woodworkers Local 3-433 (Kimtruss Corp.)*, 304 NLRB 1, 1- 2 (1991); *National Telephone Services*, supra, 301 NLRB 1 at 4.

Both counsel for the Charging Parties and James S. Ritter next object to the proposed settlements on grounds that, while those, with CWA as the named respondent, provide for a make-whole remedy and the notices specify what year an objecting

nonmember will be made whole for monies, which were not spent on representational activities, the determination as to the precise amounts owed to each named objector apparently would be within the complete discretion of the Regional Director of Region 20 with the parties having no right of review, there is no stated formula or criteria to aid in establishing the parameters in which the Regional Director will make his determinations, and there is no stated mechanism for the resolution of disputes. Arguing in support of the settlement agreements, counsel for the General Counsel argues that the make- whole determination procedure will be in accord with the Board's Rules and Regulations and the Casehandling Manual, that Regional compliance personnel have expertise in the mechanics of the compliance process, that the Charging Parties possess all the information as to the "factors" to be considered in computing the dollar amounts, and that the General Counsel is challenging CWA's characterization of its expenses rather than the labor organization's calculations of the amounts spent in any given category. It is, of course, the norm in unfair labor practice proceedings to have the matter of backpay resolved during the compliance stage, and, even when a matter is resolved by settlement rather than after the issuance of a decision, it is not unusual to leave the amount of backpay unspecified, requiring such to be determined during the compliance process. However, while backpay is normally a function of calculating gross earnings and subtracting interim earnings and reimbursement usually involves a simple calculation, Judge Litvack is not, at all, sanguine that the Regional Director's calculations will be as simple and straightforward as asserted by counsel for the General Counsel. We are dealing with an uncertain area of law herein, and CWA's expenses, in any given category, may not be as susceptible to simple calculation as claimed. Further, as argued by the Charging Parties, it, indeed, may be the case that the Regional Director could be forced to rely upon presumptions and/or percentages if exact expense amounts are not available. Moreover, one faces the reality that, unlike after a hearing and decision by an administrative law judge and the Board, compliance after a settlement agreement does not require a backpay hearing for the resolution of disputes. Thus, Judge Litvack understands and is sympathetic towards the position of the Charging Parties with regard to leaving the matter

of the make-whole remedies to the unfettered discretion of the Regional Director of Region 20. However, while unsatisfactory, neither the absence of stated reimbursement amounts nor the make-whole remedy calculation procedure present sufficient grounds for rejecting the proposed settlement agreements. Rather, permitting any of the named objectors to protest the calculation of, or the amount of, his union-security money reimbursement to Judge Litvack will ensure that any of the above individuals will have a mechanism to resolve disputes. Accordingly, with the stated proviso, the objection is not deemed sufficient to block acceptance of the proposed settlement agreements.

Counsel for the Foundation further objects to approval of the CWA settlement agreements on grounds that the General Counsel has not been consistent in seeking remedies in indistinguishable situations and that, given the nationwide breadth of the alleged unfair labor practices, a correspondingly broad remedy is appropriate, including posting of notices on all workplace bulletin boards where CWA has posting privileges and represents employees under the Act. As to the former objection, the simple answer is that counsel should argue this point to the General Counsel and not to Judge Litvack, who is concerned only with the above-captioned consolidated cases and has no authority as to any other proceeding. With regard to the latter objection, counsel for the General Counsel points out that not only will signed copies of the national and local notices be posted in CWA's national office and in the offices of all affiliated Local unions, involved herein, but also, to the extent CWA has posting privileges, the notices will be posted at the worksites in which named employees work. If CWA does not have posting privileges at a worksite, permission will be sought to allow the posting. In addition, copies of the CWA's new *Beck* notice, which fully complies with the dictates of the General Counsel will be published in the *CWA News*, the labor organization's internal publication, which is mailed to the home of every employee for whom CWA is the statutory bargaining representative. Finally, new employees, who have not been given a copy of the new *Beck* notice, will be provided with a separate copy. It is the view of Judge Litvack that the notice posting herein [19]is

sufficiently broad to remedy the breadth of the instant allegations and fully comports with Board standards. Moreover, it is noted that CWA has committed to making available the language of its revised *Beck* notice to every employee whom it represents. While, arguably, Judge Litvack may have fashioned a broader notice-posting remedy had these allegations gone through the hearing process, it must be borne in mind that settlement agreements represent compromise prior to final litigation and the notice posting does comport with Board standards. Accordingly, Judge Litvack finds these objections to be without merit

Turning to specific objections to particular settlement agreements, James S. Ritter argues that, in Case 20-CB-8752-2, the proposed monetary relief due him is insufficient as CWA's unfair labor practices, with regard to him, began earlier than 6 months prior to the date on which he filed the original unfair labor practice charge in the case—January 16, 1990—and were of a continuing nature. In so contending, he asserts that the Section 10(b) of the Act statute of limitations period does not apply to him. Contrary to Ritter, there can be no question herein but that, at all times material herein, he has been an employee within the meaning of the Act, and I can see no valid reason why the tenets of Section 10(b) should not apply to him. Moreover, consistent with the underlying theory of the amended consolidated complaint, Ritter's make-whole remedy covers the year in which he filed *Beck* objections and any subsequent year in which he did so. Accordingly, Judge Litvack can find no reason for rejecting the above settlement agreement on the stated grounds.

Counsel for the Foundation objects to several of the individual settlement agreements. First, as to that involving Pennsylvania Bell, Case 20- CA-24168, counsel objects to its approval on grounds that there is nothing in the notice requiring joint and several liability for monies which were wrongfully deducted from Michael Stork's wages and transmitted to, and accepted by, CWA. Contrary to counsel, I have previously stated that CWA, in a companion settlement agreement, General Counsel's Exhibit 3, has committed to reimburse Stork for all union-security monies received from him for all but representational activities. In these circumstances, as primary liability lies

with CWA and as, from a practical standpoint, there exists no reason to make Pennsylvania Bell jointly and severally liable when CWA is financially able to make whole Stork and has committed to do so, I find no merit to this objection. Counsel next objects to the settlement agreement in Case 20-CB-8752-5, as such applies to Eileen Accetta, on grounds that it does not require CWA to refrain from charging employees for nonrepresentational costs in the future and does not require CWA to cease making threats, short of discharge, which are designed to exact more from employees than representational costs. Contrary to counsel, the settlement agreement provides monetary relief for Accetta in accord with the alleged unlawful conduct, and counsel for the General Counsel points out that CWA's new national *Beck* procedure does provide for an "advanced reduction" to an objector of dues monies, which previously CWA had classified as representational but which, pursuant to the settlement agreement, will henceforth be classified as nonrepresentational. Furthermore, the amended consolidated complaint alleges that CWA unlawfully threatened Accetta with discharge, and, of course, the settlement agreement provides a remedy for the threat. No lesser threat is alleged and no corresponding remedy is required. Accordingly, this objection is found to be without merit.

Counsel for the Foundation next objects to the settlement involving James M. Cabot, Case 20-CB-8752-10, pointing out that the alleged unfair labor practice concerned the failure of CWA to recognize his membership resignation and failure to give him any *Beck* notice, at all. Accordingly, counsel contends that such is the "equivalent" of having no *Beck* plan and that, therefore, "they have no obligation to pay representational fees until *Beck* compliance is achieved." While, as support for his argument, counsel points to the remedy in another Board case, such is, apparently, at odds with the General Counsel's theory underlying the amended consolidated complaint in these cases. Thus, according to counsel for the General Counsel, the significant difference between the cited case and the instant cases is that CWA does have a *Beck* procedure, however flawed, in place while the Union, in the cited case, did not. Counsel points out that Cabot and other employees were aware of the *Beck* policy

as they filed objections to the payment of union-security monies for nonrepresentational activities. Thus, in accord with the General Counsel's theory, Cabot should receive reimbursement only for that part of his union-security payment which covered nonrepresentational activities. Such is the General Counsel's underlying theory, and one must conclude that the settlement agreement substantially remedies the alleged unfair labor practice. As stated above, the General Counsel controls the theory of the amended consolidated complaint, and counsel for the Foundation is bound by it. Furthermore, as what is involved is a settlement of the unfair labor practice allegations, Judge Litvack is not authorized at this stage in the proceeding to question its validity. Accordingly, counsel's objection to the settlement agreement, pertaining to James Cabot, is deemed without merit.

Counsel for the Foundation next objects to the settlement agreement involving Diane Dilly, Case 20-CB-8752-11, on grounds, as with Eileen Accetta, that the notice is not directed towards threats other than discharge threats, that there is nothing to permit employees, such as Dilly, to pay less than full fees while challenges are pending, that the settlement does not provide that CWA, in the future, will not demand more than fees covering its representational costs, and, other than legislative lobbying expenses, no other nonrepresentational activities are mentioned. According to counsel for the General Counsel, the underlying theory of the amended consolidated complaint paragraphs, regarding Dilly, is that CWA's allegedly unlawful act was the threat of discharge for failure to pay union-security monies, which included nonrepresentational costs, and not the act of refusing to permit her to pay for only what she regards as monies, covering representational expenses, while a challenge is pending over such. While counsel for the General Counsel's explanation of the underlying theory was clear, Judge Litvack notes that paragraph k6 of the amended consolidated complaint specifies that the threat to cause Dilly's discharge was "because of her activities described above in [the two preceding paragraphs]," one of which concerned her monthly tenders to the labor organization of "50 percent of full union security monies." The plain meaning of the amended consolidated complaint paragraphs is that the discharge threat, based on what Dilly did, is allegedly

unlawful. Therefore, one would expect, in a settlement agreement remedying the [20]alleged unfair labor practice, notice language providing for CWA's commitment not to threaten the discharge of employees who act, as did Dilly. In fact, such a provision does appear in the attached notice of General Counsel's Exhibit 11, but it has been inexplicably crossed out. Further, if the allegedly violative act, involving Dilly, was merely a threat of discharge because she failed to pay union-security monies alleged to include nonrepresentational expenses, the allegation paragraphs do not so read, nor is such explicitly remedied in the settlement agreement. In these circumstances, I find merit to counsel's objection to General Counsel's Exhibit 11.

Counsel for the Foundation objects to the settlement agreement in Case 20-CB- 8752-13, involving Robert Browne, on grounds that the settlement remedies allegedly unlawful pre-September 1988 conduct at a time when CWA maintained a so-called "charge and rebate" procedure, pursuant to which it exacted union- security payments in excess of what was necessary to cover representational expenses, and that, accordingly, relief should include a full refunding of the above payments. As explained by counsel for the General Counsel, the underlying theory draws a distinction between a situation where there is no *Beck* plan and one in which, however flawed, a *Beck* system is in place and would require the labor organization, which utilizes a flawed procedure, to collect only "what are properly characterized as representational monies." As stated above, as such is the theory, upon which the unfair labor practice charges, involving Robert Browne, are based, counsel may not seek to enlarge upon them, and Judge Litvack's sole responsibility, at this point, is to determine if the settlement agreement substantially remedies the allegations and not to question the merit of the General Counsel's theory. Accordingly, as counsel for the Foundation's objection seems clearly to question the underlying legal theory, it can not be sustained and is rejected.

Counsel for the Foundation next questions the settlement agreement in Case 20-CB-8752-17, involving Jack Luchen, on grounds that the agreement provides no remedy for what counsel considers to be an unlawful union-security clause. Recognizing

that the amended consolidated complaint allegations, pertaining to this unfair labor practice charge, do not allege an unlawful union-security clause, counsel suggests that the amended consolidated complaint be amended to include such an allegation. This objection is without merit. Neither the underlying unfair labor practice charge nor the amended consolidated complaint contain the suggested allegation. If counsel felt the union-security clause involved in this particular unfair labor practice charge was invalid, he should have included the allegation in the unfair labor practice charge or filed an amended charge. No remedy can be provided without an allegation of unlawful conduct. The next settlement agreement, to which counsel for the Foundation objects, is in Case 20-CB-8752-20, involving Floyd Anderson. As to this counsel objects on grounds that, as the unfair labor practice allegation is that of CWA failing to acknowledge employees' right to resign, the monetary relief should be full reimbursement of union-security monies, as if no *Beck* plan was in place. For reasons discussed above with regard to the settlement agreements in Cases 20-CB-8752-10 and 20-CB-8752-13, I find this objection to be without merit and is rejected. Finally, while counsel for the Foundation has also objected to the settlement agreement in Case 20-CB-7726 on grounds that such does not include a remedy for named objector Michelle White, I shall deny it as a remedy has been provided for White in the settlement agreement, which has been received as General Counsel's Exhibit 10, involving the New York Telephone Company. Accordingly, based upon the foregoing:

It is hereby ordered that the settlement agreement in Case 20-CA-24168 be, and the same hereby is, approved; that Case 20-CA-24168 be, and the same hereby is, severed from the remainder of the above-captioned matters and remanded to the Regional Director of Region 20 for the purpose of compliance; and that, upon completion of compliance, counsel for the General Counsel file, with Administrative Law Judge Burton Litvack, a proper motion, requesting that the underlying amended consolidated complaint allegations be dismissed and the hearing, in the matter, closed.

IT IS HEREBY FURTHER ORDERED that the settlement agreement in Case 20-CB-8752-11 be, and the same hereby is, rejected.

IT IS HEREBY FURTHER ORDERED that the settlement agreements in the remainder of the above-captioned matters, received in evidence as General Counsel's Exhibits 3, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, and 16, be, and the same hereby are, approved; that the above-captioned matters be, and the same hereby are, remanded to the Regional Director of Region 20 for the purpose of compliance with the proviso that all parties are satisfied as to the monetary amounts which CWA shall reimburse to each named financial core member. If any disputes arise as to the amounts of money to be reimbursed to any named individuals, upon proper motion to Judge Litvack, the latter shall consider the matters, give each party an opportunity to present argument as to what it considers to be the proper calculations and the proper make-whole amounts, and, if need be, set the matters for hearing limited to the reimbursement issue, and that, upon compliance, counsel for the General Counsel file with Judge Litvack a proper motion requesting that the underlying amended consolidated complaint be dismissed and the hearing in the matters be closed.

Dated: May 13, 1992

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FILED

OCT 27 1997

CLERK

No. 97-355

In the Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL LEE FINERTY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the union did not violate its duty of fair representation under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, by calculating the reduced agency fee charged to objecting nonmember employees on a union-wide rather than a unit-by-unit basis, or by failing to provide objectors with unit-by-unit financial disclosure reports.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 113 F.3d 1288. The decision and order of the National Labor Relations Board (Pet. App. 10a-19a) and the decision of the administrative law judge (Pet. App. 19a-50a) are reported at 322 N.L.R.B. 142.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1997. The petition for a writ of certiorari was filed on August 27, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(b)(1)(A) of the National Labor Relations Act (NLRA) makes it an unfair labor practice for a union to "restrain or coerce * * * employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. 158(b)(1)(A). Section 7 of the NLRA affords employees the right to engage, or refrain from engaging, in activities in support of collective bargaining. 29 U.S.C. 157. An employer and a union may, however, contract to require as a condition of employment that unit employees maintain "membership" in the union, provided that membership is available to all and that it requires nothing more than "tender[ing] the periodic dues and the initiation fees uniformly required." 29 U.S.C. 158(a)(3); see *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963) ("Membership as a condition of employment is whittled down to its financial core."). The NLRA also permits an "agency shop" arrangement under which employees are not required to maintain "membership" in the union but are required, as a condition of continued employment, to pay to the union sums equal to the initiation fees and periodic dues paid by union members. *Id.* at 743-744.

As construed in this Court's decisions, the NLRA does not "permit[] a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment." *Communications Workers of America* v. *Beck*, 487 U.S. 735, 738 (1988). When it receives such objections from nonmember fee payers, the union must calculate "what proportion of [union] expenditures went to activities that could be charged to

dissenters" and then make an appropriate reduction in the fees required of objecting nonmembers. *Ellis* v. *Railway Clerks*, 466 U.S. 435, 457 n.15 (1984).

2. The Communications Workers of America (CWA or Union) is an International Union representing 562,000 employees in 2400 bargaining units in the United States and Canada. Most of those employees work in different bargaining units in the telecommunications industry. The remaining employees work primarily in the printing/publishing industry, the health care industry, or in state and local governments. See Pet. App. 3a-4a, 11a, 23a-24a.

The CWA is divided into eight geographic districts and 1100 affiliated locals within the United States. However, the CWA, rather than the districts and locals, is the certified bargaining representative for all employees in the 2400 bargaining units. In that capacity, the CWA oversees all aspects of the collective-bargaining process, from establishing industrywide bargaining goals on such matters as compensation, benefits, job security and working conditions, to the actual negotiation, administration and enforcement of bargaining agreements with industry employers. Representatives from the districts and locals provide assistance to the CWA with respect to many of these duties, especially contract negotiations and grievance-arbitration processing. In addition, the CWA hires district organizers who are charged with organizing new bargaining units, and it employs a legal department whose attorneys are responsible for labor-relations litigation and other legal matters associated with its role as a labor organization. See Pet. App. 11a, 23a-28a.

Many CWA collective bargaining agreements include agency shop clauses, which obligate nonmem-

bers, as a condition of continued employment, to pay an agency fee to the Union equal to normal membership dues. The CWA has established a procedure by which nonmembers may object to the payment of dues and fees expended by the Union on activities unrelated to collective bargaining. A nonmember must file an objection during the month of May for the upcoming "fee year" that runs from July 1 through June 30. Upon receipt of the objection, the CWA sends the objector an "advance reduction" check equal to the portion of an objector's fee year payment that the Union determines constitutes "nonchargeable" expenses. Along with the check, the CWA includes a disclosure report summarizing its major categories of chargeable and nonchargeable expenditures, with an explanation of how the dues reduction fee was calculated. See Pet. App. 11a-12a, 28a-29a.

A single nationwide reduced fee is calculated for all objectors based on the CWA's chargeable versus nonchargeable national expenditures, without regard to the particular bargaining unit in which an objector is employed. For example, the CWA defines strike benefits as a chargeable expense requiring the financial support of all objectors, *i.e.*, objectors employed in the unit on strike as well as objectors employed in other bargaining units in the same industry and in bargaining units in different industries. In short, the reduced fee charged to objectors does not vary according to the objector's bargaining unit, industry, or employer. Because the CWA's chargeable expenses are not calculated on a unit-by-unit basis, the disclosure report that it sends to the objectors does not break down by unit the allocation of union expenditures to the chargeable versus nonchargeable categories. See Pet. App. 12a, 29a-30a.

3. Petitioners are objecting nonmember employees in the CWA's Pacific Bell/Nevada Bell bargaining unit. The agreement covering employees in that bargaining unit contains an agency shop clause. Petitioners filed charges with the National Labor Relations Board (NLRB or Board), alleging that the CWA had breached its duty of fair representation in violation of Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A), by requiring objectors to pay for representational expenses incurred outside that unit. The General Counsel investigated the charges and issued a complaint, alleging that the CWA's objection procedure is unlawful in that the union "fails to break down expenses into representational and nonrepresentational categories on a unit-by-unit basis in its disclosure statement to objecting non-members," and that it "charges objecting non-member employees for representational expenses not attributable to the unit in which they are employed." Pet. App. 13a.

The NLRB dismissed the complaint, concluding that the Union had not violated its duty of fair representation. Pet. App. 10a-18a. The Board relied (*id.* at 14a-15a) on its decision in *California Saw and Knife Works*, 320 N.L.R.B. 224 (1995), in which it had concluded that a union does not violate its duty of fair representation by "engag[ing] in cross-unit agglomeration and averaging to determine a single nationwide chargeable fee applicable to all objectors." Pet. App. 15a. The Board noted as well that the CWA (rather than the relevant local union) "is the recognized bargaining agent for all employees" in the local bargaining units. *Ibid.* In the Board's view, that fact strengthened the presumption that the "'parent will bring to bear its often considerable economic, political, and informational resources' in support of each

bargaining unit." *Id.* at 15a-16a (quoting *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 523 (1991)). The Board also concluded that the CWA "did not act unlawfully by failing to allocate its chargeable expenses on a unit-by-unit basis in its disclosure statement sent to objectors." *Id.* at 16a.

The Board made clear, however, that the CWA's calculation of the appropriate nationwide fee remained subject to challenge in an appropriate case. It observed that "the figure produced by the [CWA's] application of the formula * * * may be contested in a subsequent challenge proceeding where the [CWA] will bear the burden of proving that the local union's expenditures are chargeable." Pet. App. 17a-18a. "[A]bsent a challenge proceeding establishing the invalidity of the local presumption formula," however, the Board "h[e]ld that as an *initial* matter, the [CWA's] allocation formula is not * * * per se unlawful." *Id.* at 18a.

4. The court of appeals affirmed. Pet. App. 1a-9a. It concluded that the Board's decision was "a logical outgrowth of *Lehnert*." *Id.* at 2a. The court added that "judicial precedent supports the Board's * * * use of a 'local presumption' in allocating expenses—*i.e.*, an assumption that allocation on a union-wide basis is equivalent to allocation on a unit-by-unit basis." *Ibid.* The court also "agree[d] with the Board that unit-by-unit disclosure is not necessary to ensure that nonmembers are paying only for properly chargeable activities." *Ibid.*

In upholding the NLRB's dismissal of the General Counsel's complaint, however, the court of appeals made clear that its decision did not foreclose all challenges to the CWA's calculation of the fee charged to objecting nonmembers. Thus, the court observed that

> [b]ecause the instant case does not involve challenges to "specific representational expenses," the Board has not decided (1) whether some of the pooled charges may be impermissible (*e.g.*, charges attributable to charitable donations by the Union); or (2) whether some of the pooled charges may be collected only from employees in certain designated bargaining units (*e.g.*, money for strike funds that would be available to support employees in the private sector, but unavailable to employees in public sector units where strikes are unlawful). As the Board noted, the agency fees charged for specific representational expenses by CWA may be contested in a subsequent challenge proceeding. * * * This decision simply represents an initial finding that CWA's method of allocation is not *per se* unlawful.

Pet. App. 8a-9a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is therefore not warranted.

1. The plaintiffs in *Lehnert* v. *Ferris Faculty Association*, 500 U.S. 507 (1991), contended that a public-sector union "may not utilize dissenters' fees for activities that, though closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which the objecting employees belong." *Id.* at 519.[1] This Court rejected

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[1] The plaintiffs in *Lehnert* were members of the faculty of Michigan's Ferris State College, a public institution. They did not belong to the Ferris Faculty Association (FFA) but were

that argument. The Court stated that, while it had consistently looked to whether nonideological expenses were "germane to collective bargaining," it had "never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit." *Id.* at 522. To require such a direct relationship, the Court explained, would be "to ignore the unified-membership structure" of many unions, under which "membership in the local union constitutes membership in the state and national parent organizations." *Id.* at 523. The Court continued:

> The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year.

Ibid. Accordingly, the Court concluded that "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting

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required, under an agency shop arrangement with the college, to pay to FFA, the Michigan Education Association (MEA), and the National Education Association (NEA) a service fee equivalent to a union member's dues. See 500 U.S. at 511-513.

employees' bargaining unit." *Id.* at 524.[2] See also *Ellis* v. *Railway Clerks*, 466 U.S. 435, 448-449 (1984) (under Railway Labor Act, objecting employees may be required to contribute to the costs of the national union's conventions); *Lehnert*, 500 U.S. at 523 (citing *Ellis*).

The Court cautioned, however, that its holding should not be construed "to grant a local union *carte blanche* to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit." *Lehnert*, 500 U.S. at 524. Rather, the Court stated, "[t]here must be some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Ibid.* The Court provided two examples of expenditures that would not be chargeable to objectors: "a direct donation or interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally," and "a contribution by a local union to its parent that * * * is in the nature of a charitable donation." *Ibid.* Those expenditures, the Court explained, are "not part of the local's responsibilities as an affiliate," *ibid.*, and

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[2] In his separate opinion, joined by three other Justices, Justice Scalia differed with the majority over the appropriate standard for determining what expenditures are properly chargeable to objecting fee payers. See 500 U.S. at 557-558 (advocating a "statutory duties" test in place of the Court's "germane to collective bargaining" test). Justice Scalia agreed, however, that dissenting nonmembers could appropriately be required to contribute to the pool of collective bargaining resources available to each contributing unit. See *id.* at 561, 562 ("It is a tangible benefit * * * to have expert consulting services on call, even in the years when they are not used.").

thus are not part of the "local's affiliation fee which contributes to the pool of resources potentially available to the local [and which] is assessed for the bargaining unit's protection," *id.* at 523.

2. Petitioners' primary argument is that agency fee payers should not be compelled to fund union activity in bargaining units that are engaged in unrelated industries or lines of work, covered by other labor relations statutes, or located in different parts of the United States or Canada. Pet. 9-12. That contention misconceives the rationale underlying the Board's decision in this case. In holding that the NLRA does not require unit-by-unit fee calculations, the Board did not suggest that petitioners may be compelled "to fund collectivism in foreign nations and among public sector employees," Pet. 10, or otherwise to subsidize activities unrelated to the Union's representation of their own bargaining units. Rather, the Board has concluded—consistent with *Lehnert*—that a union acting as a collective bargaining representative may create a pool of resources that will be available, as needed, to each affiliated bargaining unit, and may finance that endeavor by requiring each potential beneficiary to contribute on a fixed periodic schedule regardless of whether a particular unit actually draws upon those resources in any given period. See pages 8-9 & note 2, *supra*. That rationale applies with equal force whether the contributing units are in the same industry in the same State, in different industries in Canada and the United States, or in different States with different collective bargaining laws within the United States.[3]

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[3] There is consequently no merit to petitioners' contention (Pet. 18-19) that the CWA's union-wide dues allocation formula

Thus, the court of appeals properly concluded that the Board's decision in this case was "a logical outgrowth of *Lehnert*" and that petitioners had failed to demonstrate a breach of the Union's duty of fair representation. Pet. App. 2a. Indeed, as the Board noted, "there is an even greater justification than in [*Lehnert*] for the [CWA's] practice of charging all objectors a uniform nationwide service fee because, unlike the international union[] in [*Lehnert*], the [CWA] here is the recognized bargaining agent for all employees." *Id.* at 15a. "In that role," the Board explained, "there is a stronger presumption than when a local union is the bargaining representative, that the 'parent will bring to bear its often considerable economic, political, and informational resources' in support of each bargaining unit." *Id.* at 15a-16a (quoting *Lehnert*, 500 U.S. at 523).

3. Contrary to petitioners' contention, the Board's rationale is fully consistent with "the existence of discrete and clearly defined bargaining units" (Pet. 12) contemplated by the NLRA. Although the NLRA presupposes the existence of discrete bargaining units, nothing in the Act requires unions to formulate their bargaining strategies on a unit-by-unit basis. "[A] union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union." *Mine Workers* v. *Pennington*,

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gives the NLRA an impermissible extraterritorial effect. Although the CWA has locals in Canada, the dues paid to the CWA by the Pacific Bell/Nevada Bell bargaining unit are assessed for that bargaining unit's protection, not for the purpose of organizing employees in Canada or influencing the course of bargaining in the CWA's Canadian units.

381 U.S. 657, 665 n.2 (1965). And a union may engage in coordinated bargaining along with the other unions representing other bargaining units. *General Electric Co.* v. *NLRB*, 412 F.2d 512, 516-520 (2d Cir. 1969).[4] A union enjoys the same latitude in determining how best to "provide bargaining expertise or financial support" in representing the various units that have chosen it as their bargaining agent. *NLRB* v. *Financial Institution Employees*, 475 U.S. 192, 199 n.5 (1986). The CWA's cost-pooling method of financing collective bargaining activities is well within the "wide range of reasonableness [that] must be allowed a statutory bargaining representative in serving the unit it represents." *Air Line Pilots* v. *O'Neill*, 499 U.S. 65, 75 (1991) (quoting *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953)).

4. Like the court in the instant case, other courts of appeals have held that a union may permissibly employ a "local presumption"—*i.e.*, an assumption that the allocation between chargeable and non-chargeable expenditures for the overall union is equivalent to the

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[4] In certain circumstances, it may be unlawful for a union to refuse to sign a negotiated agreement in one unit in order to respond to union demands affecting another unit. The Board found such to be the case in *Paperworkers Local 620 (International Paper Company)*, 309 N.L.R.B. 44 (1992) (cited at Pet. 13), where it invalidated a "pooled" voting system that would have allowed the employees in one bargaining unit to veto contract ratification decisions made by employees in other units. The wrong in such a case, however, is the refusal to sign agreements that have already been negotiated, see *Paperworkers*, 309 N.L.R.B. at 45 ("The result [of the pooled voting arrangement] is a system that allows for refusal to sign an agreement on the basis of a nonmandatory subject of bargaining."), not the decision to devise a bargaining strategy that takes into account the interests of all represented units.

allocation for each of its local units—in allocating chargeable expenses. See, *e.g.*, *Crawford* v. *Air Line Pilots Ass'n Int'l*, 992 F.2d 1295, 1301 (4th Cir.) (en banc), cert. denied, 510 U.S. 869 (1993); *Pilots Against Illegal Dues* v. *Air Line Pilots*, 938 F.2d 1123, 1128-1129 (10th Cir. 1991); *Price* v. *International Union, UAW*, 927 F.2d 88, 92 (2d Cir.), cert. denied, 502 U.S. 905 (1991). Petitioners cite no contrary authority.[5]

5. Finally, both the Board (Pet. App. 16a n.4, 17a-18a, 41a n.14) and the court of appeals (*id.* at 8a-9a) recognized that the dismissal of the complaint in this case does not foreclose all challenges to the manner in which the CWA calculates the agency fee charged to objecting nonmember employees. As the court of appeals explained, "the Board has not decided (1) whether some of the pooled charges may be impermissible (*e.g.*, charges attributable to charitable donations by the Union); or (2) whether some of the pooled charges may be collected only from employees in certain designated bargaining units." *Ibid.*[6] The Board's "decision simply represents an initial finding that CWA's method of allocation is not *per se* unlawful." *Id.* at 9a.

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[5] Having rejected petitioners' claim that the CWA was required to calculate the objecting nonmembers' fees on a unit-by-unit basis, the court of appeals was correct in holding that "unit-by-unit financial disclosure is not necessary to ensure that nonmembers are paying only for properly chargeable activities." Pet. App. 9a.

[6] As an example of charges that might fall into the latter category, the court referred to "money for strike funds that would be available to support employees in the private sector, but unavailable to employees in public sector units where strikes are unlawful." Pet. App. 9a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-355

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL LEE FINERTY, et al.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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The brief of the National Labor Relations Board ("Board") hides the actual — and most egregious — effect of the decision below: American workers in the private sector are now required to support collective bargaining in foreign nations and among public sector employees, if that is what the union chooses to do with its compulsory dues. (Board Brief in Opposition to the Petition ("Opp.") at 10).

The Board specifically permits CWA to "pool" resources across all bargaining unit lines "whether the contributing units are in the same industry in the same State, in different industries in Canada and the United States, or in different States with different collective bargaining laws within the United States." (Opp. 10). Thus, the Board's decision erases the concept of "bargaining units" from the NLRA (at least where compulsory dues seizures are involved), and removes virtually all limits on CWA's ability to force compulsory support of collective activities in foreign

countries and in public sector bargaining units — no matter how unrelated those activities are to Petitioner Finerty's Pacific Bell/Nevada Bell bargaining unit.[1] But in passing the NLRA, Congress could not possibly have intended this result, which cries out for the exercise of this Court's supervisory authority.

In reaching a result that forces Americans working in the private sector to subsidize foreign and public sector bargaining units — or be discharged — the Board ignores the fact that the NLRA has no extra-territorial effect; coverage is limited to domestic employers and employees in discrete and identified bargaining units. *See, e.g.*, 29 U.S.C. § 152 (2), (3) and (6). Simply stated, foreign employees and public sector employees are not covered by the NLRA, and they are certainly not entitled to largesse seized from the salaries of unwilling American workers under color of that statute.

Thus, the Board ignores this Court's decisions holding that the NLRA does not regulate labor relations in foreign nations, *e.g.*, the working conditions of foreign employees on foreign vessels which are temporarily present in an American port, *McCullough v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963), or picketing by an American labor union at an American port where such picketing is aimed at altering the employment relationship between owners of foreign vessels and foreign seamen. *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215 (1974); *Windward Shipping (London) v. American Radio Ass'n*, 415 U.S. 104 (1974); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142-46 (1957). *See also International Longshoremen's Ass'n v. NLRB*, 56 F.3d 205, 210 (D.C. Cir. 1995); *Dowd v. International Longshoremen's Ass'n*, 781 F.

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[1] Disingenuous — if not completely false — is the argument in Opp. 10, n. 3, that "the dues paid to the CWA by the PacificBell/Nevada Bell bargaining unit are assessed for that bargaining unit's protection, not for the purpose of organizing employees in Canada or influencing the course of bargaining in the CWA's Canadian units." The Board's decision specifically permits the CWA to pool all of its resources across all unit lines, without regard to nationality or labor laws. Thus, the dues that Pacific Bell/Nevada Bell employees pay into the CWA's "pool" can be used to "protect" Canadian and public sector bargaining units just as much as they "protect" the Pacific Bell/Nevada Bell unit.

Supp. 1565 (M.D. Fla. 1991), *aff'd*, 975 F.2d 779 (11th Cir. 1992).

Moreover, the Board's decision goes far beyond anything contemplated by this Court in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1990). Although this Court in *Lehnert* upheld the chargeability of some extra-unit expenditures, it was careful to require some direct relationship between the objecting nonmembers' bargaining unit and the union's extra-unit expenditures.

> This conclusion, however, does not serve to grant a local union *carte blanche* to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit.... There must be some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.

500 U.S. at 524.

But the Board did not feel similarly constrained, even though there is nothing in CWA's representation of Canadian and public sector bargaining units that can ever "inure to the benefit" of Michael Finerty and his Pacific Bell/Nevada Bell bargaining unit. Indeed, there is not a scintilla of evidence in the extensive stipulated record which even hints at the notion that CWA's efforts in these diverse bargaining units has any impact upon the bargaining units covered by the NLRA, such as the Pacific Bell/Nevada Bell unit. Under these circumstances, CWA's expenditures in unrelated foreign and public sector bargaining units are more akin to the "donation[s] or interest-free loan[s]" that were declared nonchargeable in *Lehnert* than to the extra-unit "affiliation" activities found to be chargeable. 500 U.S. at 523-24.

CONCLUSION

The decision of the Board is erroneous as a matter of law, because it achieves a result that Congress never intended: millions of Americans covered by the NLRA are consigned to support collective bargaining in units not covered by the NLRA, including foreign and public sector units. This Court should grant the Petition and schedule this case for full briefing and argument.

Respectfully submitted,

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